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Supreme Court of the United States

OCTOBER TERM, 1959

No. 342

HOWARD L. NOSTRAND, ET AL., APPELLANTS,

vs.

THOMAS BALMER, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED AUGUST 24, 1959
PROBABLE JURISDICTION NOTED OCTOBER 26, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 342

HOWARD L. NOSTRAND, ET AL., APPELLANTS,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 30, 1959

[fol. 3]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 28814

HOWARD L. NOSTRAND and MAX SAVELLE, Plaintiffs,

vs.

MRS. J. HERBERT GARDNER, CHARLES M. HARRIS, GRANT ARMSTRONG, CHARLES F. FRANKLAND, DONALD G. CORBETT, THOMAS BALMER, WINLOCK W. MILLER, as the Board of Regents of the University of Washington, HENRY SCHMITZ, H. P. EVEREST and DON EASTVOLD, Defendants.

COMPLAINT—Filed August 29, 1955

Plaintiffs allege as follows:

I

They are residents of King County, Washington, and are presently employed under contract as professors by the University of Washington, hereinafter called the University, an institution of higher learning owned and operated by the State of Washington, through the defendant Board of Regents.

II

Through plaintiffs' employment contracts and pursuant to the terms of R.C.W. 28.76 and the rules and regulations of the University, plaintiffs have employment tenure and certain retirement benefits.

III

Defendants Mrs. J. Herbert Gardner, Charles M. Harris, Grant Armstrong, Charles F. Frankland, Donald G. Corbett, Thomas Balmer, and Winlock W. Miller are the duly [fol. 4] appointed and acting members of the Board of

Regents; Henry Schmitz is the President of the University; H. P. Everest is the Vice-President of the University; the foregoing defendants are charged by law with appointing, employing, supervising and discharging employees of the University.

IV

Don Eastvold is the duly elected, qualified and acting Attorney General of the State of Washington, charged by law with the duty of enforcing and interpreting, on behalf of State officials, the statutes of the State of Washington; he is the legal advisor to the Regents and to the University officials.

V

All defendants are charged with the duty of establishing, enforcing, carrying out and administering the provisions of Chapter 377, Laws of 1955, hereinafter called the Act, enacted by the Legislature of the State of Washington on March 9, 1955, approved by the Governor on March 21, 1955. The Act provides that each department head in the State of Washington must require that each employee under his charge state under oath whether or not he is a member of the Communist Party or other subversive organization, or upon failure to execute such oath, his employment be terminated.

VI

Pursuant to the Act, defendants have demanded that plaintiffs sign and swear to an oath, a copy of which is attached hereto, marked Exhibit "A"; and unless plaintiffs comply with such demands, their employment contracts with the University will be terminated by the defendants.

[fol. 5]

VII

The terms, provisions, and requirements of the Act and the oath are in violation of plaintiffs' rights, privileges and immunities under the Constitution of the United States in the following particulars:

1. They violate the rights guaranteed under the First Amendment as made applicable to the States by the Fourteenth Amendment;

2. They violate the rights guaranteed under the Fifth Amendment as made applicable to the States by the Fourteenth Amendment;

3. They deprive the plaintiffs of their rights without due process of law and deny them the equal protection of the laws as guaranteed by the Fourteenth Amendment; and

4. They constitute a Bill of Attainder contrary to Article 1, Section 10.

VIII

The terms and provisions of the Act and the oath are in violation of plaintiffs' rights, privileges and immunities under the Constitution of the State of Washington in the following particulars:

1. They are a denial of due process under Article 1, Section 3;

2. They are a denial of the right to peaceably assemble under Article 1, Section 4;

3. They violate the right to freely speak, write and publish under Article 1, Section 5;

4. They violate Article 1, Sections 9 and 12; and

5. They constitute a Bill of Attainder contrary to Article 1, Section 23.

[fol. 6]

IX

This action is brought by the plaintiffs under the authority of R.C.W. 7.24.010 et seq., relating to declaratory judgments for the purpose of testing and determining the constitutionality of the Act, and the right of the defendants to establish, enforce, carry out, and administer the provisions thereof through the insistence that plaintiffs and other state employees execute the oath, or otherwise.

X

Unless the defendants be restrained from enforcing, carrying out and administering the provisions of the Act, and from insisting upon the execution of the oath, the plaintiffs will suffer great and irreparable injury not compensable in monetary damages; plaintiffs have no speedy and adequate remedy at law. Should plaintiffs insist on maintaining their aforedescribed constitutional rights and refuse to execute the oath demanded from them, they will be subject to immediate discharge from their employment.

Wherefore, plaintiffs pray for relief as follows:

1. Pending a final determination and judgment herein, that the defendants be temporarily restrained and thereafter temporarily enjoined from establishing, enforcing, carrying out, and administering, through the use of the oath or otherwise, the provisions of Chapter 377, Laws of 1955;

2. For an adjudication by this Court that Chapter 377, Laws of 1955, violates the Constitution of the United States and of the Constitution of the State of Washington, and is therefore void and of no effect;

[fol. 7]

3. The defendants be permanently enjoined from enforcing Chapter 377, Laws of 1955, and from requiring any oath pursuant to said Act;

4. For such other and further relief as the Court may deem just and equitable.

Byron D. Coney, Francis Hoague and Solie M. Ringold, Attorneys for Plaintiffs.

Duly sworn to by Howard L. Nostrand and Max Savelle, jurat omitted in printing.

[File endorsement omitted]

[fol. 8]

EXHIBIT "A"—TO COMPLAINT

COPY

STATE OF WASHINGTON

OATH FOR ADMINISTRATIVE, RESEARCH, AND FACULTY PERSONNEL OF THE UNIVERSITY OF WASHINGTON

Department, office or other agency (Print or type)	Title or position (Print or type)
.....	.....

STATE OF .....)
) ss.
COUNTY OF .....)

AFFIDAVIT

I, the undersigned, do solemnly swear (or affirm):

(1) That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence;

That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955, with full knowledge that the same is subject to the penalties of perjury.

.....
(Signature)

Subscribed to and sworn to (or affirmed) before me this ..... day of ....., 19...., at ....., ...
(City or place) (State).

.....
Notary Public in and
for the State of .....,
residing at .....
.....

(To be executed in duplicate,
one copy to be retained by individual)

[fol. 11]
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

[Title omitted]

ANSWER—Filed September 30, 1955

Defendants answering plaintiffs' complaint admit, deny and allege as follows:

I.

They have no knowledge or information sufficient to form a belief and therefore deny each and every allegation made in Paragraph I of plaintiffs' complaint.

II.

Deny each and every allegation made in Paragraph II of plaintiffs' complaint.

III.

Admit that the defendants Mrs. J. Herbert Gardner, Charles M. Harris, Grant Armstrong, Charles F. Frankland, Donald G. Corbett, Thomas Balmer and Winlock W. Miller are the duly appointed and acting members of the Board of Regents, but deny all other allegations in Paragraph III of said complaint.

IV.

Admit Don Eastvold is the duly elected, qualified and act- [fol. 12] ing Attorney General of the State of Washington but deny all other allegations of Paragraph IV of said complaint.

V.

Deny each and every allegation of Paragraph V of plaintiffs' Complaint.

VI.

Deny each and every allegation made in Paragraph VI of plaintiffs' Complaint.

VII.

Deny each and every allegation made in Paragraph VII of plaintiffs' Complaint.

VIII.

Deny each and every allegation made in Paragraph VIII of plaintiffs' Complaint.

IX.

Deny each and every allegation made in Paragraph IX of plaintiffs' Complaint.

X.

Deny each and every allegation made in Paragraph X of plaintiffs' Complaint.

Wherefore, the defendants pray that the complaint of the plaintiffs be dismissed and held for naught and that defendants be awarded costs and disbursements herein and such further relief as to the court seems just and equitable in the premises.

Don Eastvold, Attorney General; Michael R. Alfieri, Assistant Attorney General.

[fol. 13] *Duly sworn to by Michael R. Alfieri, jurat omitted in printing.*

[File endorsement omitted]

[fol. 31] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

[Title omitted]

Findings of Fact and Conclusions of Law—April 29, 1957

This matter coming on trial before the undersigned judge of the above-entitled court, the plaintiffs appearing through their attorneys, Solie M. Ringold and Francis Hoague, and the defendants being represented by the Attorney General of the State of Washington, testimony having been taken and arguments of counsel having been heard and considered, the court therefore makes the following

FINDINGS OF FACT

I

The plaintiffs are residents of King County, Washington, and are presently employed under contract as professors by the University of Washington, hereinafter called the University, an institution of higher learning owned and operated by the State of Washington, through the defendant Board of Regents.

II

Through the plaintiffs' employment contracts and pursuant to statute and the rules and regulations of the University, plaintiffs have certain tenure rights and certain retirements benefits.

III

Defendants Mrs. J. Herbert Gardner, Charles M. Harris; [fol. 32] Grant Armstrong, Charles F. Frankland, Donald G. Corbett, Thomas Balmer, and Winlock W. Miller are the duly appointed and acting members of the Board of Regents; Henry Schmitz is the President of the University;

H. P. Everest is the Vice-President of the University; the foregoing defendants are charged by law with appointing, employing, supervising and discharging employees of the University.

IV

At the time of the commencement of this action, Don Eastvold was the duly elected, qualified and acting Attorney General of the State of Washington, charged by law with the duty of enforcing and interpreting, on behalf of state officials, the statutes of the State of Washington.

V

All defendants are charged with the duty of establishing, enforcing, carrying out and administering the provisions of Chapter 377, Laws of 1955, hereinafter called the Act, enacted by the Legislature of the State of Washington on March 9, 1955, approved by the Governor on March 21, 1955. The Act provides that each department head in the State of Washington must require that each employee under his charge state under oath whether or not he is a member of the Communist Party or other subversive organization, or upon failure to execute such oath, his employment be terminated.

VI

Pursuant to the Act, defendants have demanded that plaintiffs sign and swear to an oath, a copy of which is attached to the complaint herein, marked Exhibit A, and have stated that unless the plaintiffs complied with such demands, their employment contracts with the University would be terminated by the defendants.

VII

Unless the defendants be restrained from enforcing, [fol. 33] carrying out and administering the provisions of the Act, and from insisting upon the execution of the oath, the plaintiffs will suffer irreparable injury not compensable in monetary damages; and plaintiffs have no speedy and adequate remedy of law.

Upon the basis of the foregoing Findings of Fact, the court makes the following

Conclusions of Law

I

Section 3 of Chapter 377, Laws of 1955, constitutes an unconstitutional delegation of legislature authority to an officer of the United States over which the State Government has no control and without adequate standards being set forth to guide such officer in the exercise of such delegation.

II

Section 4 of Chapter 377, Laws of 1955, amends Section 1, Chapter 254, Laws of 1951, in that it adds a new category of subversive organization and of subversive activity. This section, therefore, embraces subjects not set forth in the title to Chapter 377, Laws of 1955, and is, therefore, unconstitutional.

III

Chapter 377, Laws of 1955 is unconstitutional in its entirety both because the title is improper and also because Sections 3 and 4 of the Chapter are not separable from the first two sections.

IV

The plaintiffs are entitled to the declaratory relief and the injunction prayed for.

Done In Open Court this 29th day of April, 1957.

Charles T. Wright, Judge.

Presented by:

Solie M. Ringold

Copy received

Michael R. Alfieri
April 24, 1957

[fol. 34]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

[Title omitted]

FINAL DECREE—April 29, 1957

This matter coming on for trial before the undersigned judge of the above-entitled court, the plaintiffs appearing through their attorneys Solie M. Ringold and Francis Hoague, and the defendants being represented by the Attorney General of the State of Washington, testimony having been taken and arguments of counsel having been heard and considered, the court having heretofore entered its Findings of Fact and Conclusions of Law, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that Chapter 377, Laws of 1955 violates the Constitution of the State of Washington, and is therefore void and of no effect; and

It Is Further Ordered, Adjudged and Decreed that the above-named defendants be and they are hereby permanently restrained from establishing, enforcing, carrying out, and administering the provisions of Chapter 377, Laws of 1955 and from requiring the plaintiffs to execute any oath pursuant to said Chapter.

Done In Open Court this 29th day of April, 1957.

Charles T. Wright, Judge

Presented by:

Solie M. Ringold

Copy received:

Michael R. Alfieri
April 24, 1957

Recorded: Roll 34 Number 35

[File endorsement omitted]

[fol. 47]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34451

HOWARD L. NOSTRAND and MAX SAVELLE, Respondents,

vs.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, Appellants.

JUDGMENT—March 20, 1959

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 20th day of March, A. D. 1959, on motion of John J. O'Connell, Esquire, of counsel for appellants, considered, adjudged and decreed that the decree of the said Superior Court be, and the same is hereby reversed with directions to dissolve the permanent injunction restraining appellants from performing their official duties under the 1955 act (except § 3) with respect to respondents and to dismiss their action. Neither party shall be allowed costs in this court.

And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 48]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34451

EN BANC

HOWARD L. NOSTRAND and MAX SAVELLE, Respondents,

v.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, Appellants.

OPINION—January 29, 1959

This action was commenced by two professors (respondents), employed by the state of Washington to teach at the University of Washington, for the purpose of obtaining a declaratory judgment[1] adjudicating Laws of 1955, chapter 377,[2] to be violative of several provisions of the constitutions of the United States and of this state, and seeking a permanent injunction enjoining the enforcement thereof.

In their complaint, respondents alleged their employment under contract as professors of the University of Washington; that appellants (the university board of regents, president, and vice-president, and the state attorney general) are charged with "the duty of establishing, enforcing, carrying out and administering the provisions of . . . the Act"; that appellants have demanded that respondents sign and

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[1] Pursuant to the provisions of RCW 7.24.010, *et seq.*

[2] This act consists of four sections, the first two of which are amendatory of provisions initially enacted in the subversive activities act, Laws of 1951, chapter 254, and the last two of which are entirely new legislation.

swear to an oath; that, unless respondents comply with [fol. 49] such demands, their employment contracts with the university will be terminated by appellants; that, unless appellants be restrained from enforcing the act and insisting upon the execution of the oath, respondents will suffer irreparable injury not compensable in monetary damages; and that respondents have no adequate remedy at law.

In so far as is presently material, the affidavit which appellants demanded that respondents subscribe, upon oath, recites above the jurat and place provided for signature:

> "(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence;
>
> "That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955, with full knowledge that the same is subject to the penalties of perjury."

Prior to trial, respondents requested, in writing, and obtained certain admissions of fact. Other facts which respondents requested appellants to admit were denied. The record before us does not reveal what disposition, if any, the trial judge made of these disputed factual matters.

Trial to the court resulted in the entry of findings of fact (substantially in accord with the averments contained in the complaint), conclusions of law, and a final decree holding the entire act of 1955 to be violative of the constitution of this state, and permanently restraining appellants from administering and enforcing any of the provisions therein contained.[1] This appeal followed.

[1] The material portions of the final decree read as follows:

> "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Chapter 377, Laws of 1955 violates the Constitution of the State of Washington, and is therefore void and of no effect; and
>
> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above-named defendants [appellants] be and they are hereby

[fol. 50] Before considering the respective contentions advanced by the parties, and because chapter 377, Laws of 1955, is amendatory legislation, it is necessary, in order to place it in its proper perspective, to analyze the act amended thereby, *i.e.*, the subversive activities act of 1951,[1] and to consider its background and legislative history.

The 1951 act was a comprehensive statute enacted by the legislature pursuant to executive request and as a result of the report of the joint fact-finding committee on un-American activities in the state of Washington (otherwise referred to as the Canwell committee). This committee was created by house concurrent resolution No. 10, adopted by the legislature at its 1947 session, and was directed to investigate subversive activities in the state of Washington and to file a report with the thirty-first (1949) legislature.

Acting pursuant to authority vested in it by this resolution, the committee conducted its investigation and held extensive public hearings in 1948. As directed, the com-

permanently restrained from establishing, enforcing, carrying out, and administering the provisions of Chapter 377, Laws of 1955 and from requiring the plaintiffs (respondents) to execute any oath pursuant to said Chapter."

[1] Chapter 254, Laws of 1951, p. 793.

Laws of 1947, p. 1378. Pertinent provisions of this resolution are quoted at length in appendix A. The complete text of house concurrent resolution No. 10 may also be found in *State ex rel. Robinson v. Eluent*, 30 Wn. (2d) 194, 191 P. (2d) 241 (1948), cert. den., 335 U. S. 844, 93 L. Ed. 394, 69 S. Ct. 66, wherein we upheld the validity of this resolution.

[2] Other litigation resulted from these hearings, notably *State v. James*, 36 Wn. (2d) 882, 221 P. (2d) 482, 341 U. S. 911, 95 L. Ed. 1348, 71 S. Ct. 615 (cert. den.); 341 U. S. 907, 95 L. Ed. 1365, 71 S. Ct. 851 (rehearing den.). The defendant therein was charged, tried and convicted for willfully refusing to answer a proper and material question put to him by the committee after being duly summoned to give testimony. In rejecting appellant's attack upon the constitutionality of house concurrent resolution No. 10, we adhered to our prior decision in *State ex rel. Robinson v. Eluent*, *supra*. Other cases involving witnesses before the committee who were similarly charged, tried, and convicted, were consolidated on appeal to this court: *State v. Gundlach*, *State v. Farschmidt*, *State v. Ottenheimer*, *State v. James*, 36 Wn. (2d) 918, 221 P. (2d) 502,

mittee reported its findings, conclusions, and recommenda-
[fol. 51] tions to the legislature at its 1949 session.

After receiving and considering the committee's report, the thirty-first (1949) legislature adopted, as part of its general appropriations act, a proviso[7] (similar to that adopted by the 1947 legislature[8]) designed to prevent public funds from reaching public employees who advocated, or who were members of organizations that advocated, the overthrow of the government of the United States by force or violence.

In his message to the thirty-second legislature at the commencement of its regular session in January, 1951, the governor pointed out the national emergency then existing, its causes and potential effects, and the strategic geographical position of the state of Washington in any such emergency.[9] He further urged that appropriate legislation be

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cert. den. in *Forschmidt* and *James* cases; 341 U. S. 910, 95 L. Ed. 1347, 71 S. Ct. 615, rehearing den. 341 U. S. 937, 95 L. Ed. 1365, 71 S. Ct. 851.

[7] House Journal of the thirty-first legislature of the state of Washington (1949), p. 1095. This report incorporated by reference two prior reports (First Report, Un-American Activities in Washington State, 1948, and Second Report, Un-American Activities in Washington State, 1948) of the committee which contained testimony adduced at its hearings, together with findings and conclusions drawn by the committee from that testimony which appears as prefatory remarks therein. Pertinent excerpts from the committee's final report to the legislature, including the committee's conclusions prefacing these prior reports, are set out in appendix B.

[8] Laws of 1949, chapter 242, § 2, p. 948, thereof provided, in part:

"... That no part of any appropriation contained in this act shall be used to pay the salary or wages of any person who ... advocates, or is a member of an organization that advocates, the overthrow of the government of the United States by force or violence."

[9] Laws of 1947, chapter 287, § 2, p. 1334.

[10] House Journal of the thirty-second legislature of the state of Washington (1951), p. 23:

"Again we meet in a time of great national emergency.

"All of us had fervently hoped for a long respite from the waste and sacrifice of war and preparation for war. Our coun-

[fol. 52] immediately enacted in order to curb subversive activities in this state, particularly in view of the then existing national emergency and the disclosures made through the efforts of the joint fact-finding committee on un-American activities (Canwell committee) created by house concurrent resolution No. 10."[1]

---

try had placed chief reliance in the United Nations to maintain world peace and order. We had disbanded our armies, decommissioned our fleets of ships and planes, dismantled our war plants, and turned our attention to the pressing problems of our civilian economy.

"But the evil menace of expanding communism would not have it so. While the rest of the world pursued a peaceful path, the forces of communism, bent upon a wholly different course, were gathering vast strength and power. Their method was regimentation, suppression, infiltration, intimidation and aggression. Their purpose was to push the frontiers of that ideology so deeply into the territory and institutions of free nations, that all the world would fall an easy prey. Then came the day when the principles and authority of the United Nations were openly defied in the halls at Lake Success, and physically challenged on the Korean fields of battle.

"This nation and the world are now awake to the danger. We still hope to avert World War III. But it is so perilously close that our nation has already come virtually to a war footing. This is bringing with it a fundamental change in our civilian economy, with resulting burdens and sacrifices for all of us. If the emergency becomes more acute, developing into a global war, we all face the risk of great loss and suffering. We face these possibilities, not cheerfully, but with the determination to do what must be done to preserve, for our children, the way of life all of us so deeply cherish.

"It is in this setting that the Thirty-second Legislature of the State of Washington meets to discharge its legislative duties.

"Our state occupies a position of great importance in this emergency, as it did throughout World War II. It is a tremendous arsenal for military might. Its strategic geographical location, moreover, has special military significance in any war with communism.

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[1] *Ibid.* p. 30:

"To further strengthen our civil defense program, we also must be mindful of that small group of traitors within our citizenry who would destroy our freedom from within. In this connection I strongly urge that the legislature give thought

The subversive activities act originally passed by the legislature in 1951 consisted of twenty-two sections. Five [fol. 53] of these (§§ 6, 7, 8, 10, and 21), containing administrative provisions, were vetoed by the governor.[12] The remaining seventeen sections became effective on March 19, 1951, upon executive approval.[13] Each of these sections falls into one of three general classifications: penal, administrative, or regulatory.

Sections eleven, twelve, thirteen, fourteen and seventeen bear directly upon the problem before us and are set out in the margin.[14] These sections impose conditions upon

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to enactment of appropriate provisions for the curbing of subversive activity, and to protect our free institutions from perversion into weapons of aggression against us in the hands of our enemies.

"By Concurrent Resolution No. 10, the Thirtieth Legislature created the Joint Legislative Fact Finding Committee on Un-American Activities. Through the labors of this committee much was learned of the degree to which disloyal groups had infiltrated into organizations of our senior citizens, into various economic and educational groups. As the result of these disclosures, some remedial action was taken but in the light of the grave emergency which we now face, additional action must be taken immediately. Therefore a bill is being prepared calculated to give support at the state level to the efforts of our various federal agencies charged with the responsibility of combating these forces of tyranny and enslavement. . . ."

[12] Laws of 1951, chapter 254, §§ 6, 7, and 8, pp. 797, 798, § 10, p. 798, § 21, p. 802. Senate Journal of the thirty-second legislature of the state of Washington, p. 842.

[13] Laws of 1951, chapter 254, § 22, p. 803.

[14] Laws of 1951, chapter 254:

"Sec. 11. No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state. (*cf.* RCW 9.81.060)

"Sec. 12. Every *person* and every *board, commission, council, department, court or other agency* of the state of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall *establish by*

eligibility for public employment in sensitive occupations and require that all such state employees or applicants for state employment, take an oath, subject to the penalties of

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rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. (Italics ours.) (*cf.* RCW 9.81.070)

"Sec. 13. The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof. (*cf.* RCW 9.81.080)

"Sec. 14. Every person who, on June 1, 1951, shall be in the employ of the state of Washington or of any political subdivision thereof, other than those now holding elective office, shall be required on or before July 1, 1951, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this act; namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this act. Such statements shall be prepared and execution required of and by every person and every board, commission, council, code department, court or other agency of the state of Washington or any subdivision thereof responsible for the supervision of other employees, for the employees under the jurisdiction thereof. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this act shall immediately be discharged.

"Sec. 17. Every written statement made pursuant to this act by an applicant for appointment or employment, or by any

perjury, as a prerequisite of public employment or the continuance thereof.

[fol. 54] The terms "subversive person," "subversive organization," and "foreign subversive organization" (used in these five sections) ar particularly defined in section one of the act. The definition of "subversive person" was [fol. 55] amended in 1953[15] to specifically provide that a person must have knowledge that an organization is a "subversive organization" or "foreign subversive organization" (as elsewhere defined in section one) before such person becoming or remaining a member thereof can be deemed to be a "subversive person." (This 1953 amendment is a complete answer to respondents' argument in their brief concerning the alleged lack of *scienter* as an essential element in this section.) *Cf. Wieman* v. *Updegraff*, 344 U. S. 183, 97 L. Ed. 216, 73 S. Ct. 215 (1952).

With this legislative history and background in mind, we now turn to the consideration of Laws of 1955, chapter 377, which was held by the trial court to be unconstitutional in its entirety. As previously stated, this act consists of only four sections, of which the first two purport to amend sections twelve and thirteen of the 1951 act (RCW 9.81.070 and .080), and the latter two purport to add new sections thereto (*cf.* RCW 9.81.082 and .083). These latter two sections will be considered in the order ruled upon by

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employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who wilfully makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this act, or (c) under oath in any hearing conducted by any agency of the state, or of any of its political subdivisions pursuant to this act; or (d) in any written statement by an applicant for appointment or employment or by an employee in any state aid or private institution of learning in this state, intended to determine whether or not such applicant or employee is a subversive person as defined in this act, which statement contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury, as prescribed in chapter 9.72, R.C.W." (*Cf.* RCW 9.81.110.)

[15] Laws of 1953, chapter 142, p. 273.

the trial court and discussed by the respective parties in their briefs.

Section three of the amendatory act provides:

> "For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive order No. 9835."

The trial court concluded that:

> "Section 3 of chapter 377, Laws of 1953, constitutes an unconstitutional delegation of legislative authority to an officer of the United States over which the state government has no control and without adequate stand-[fol. 56] ards being set forth to guide such officer in the exercise of such delegation."

Appellants first assign error to this conclusion. They argue that section three was merely an adoption by our legislature of a factual determination made by a foreign administrative agency (U. S. attorney general). This argument is unappealing for at least three reasons:

(1) Executive order No. 9835, promulgated by the president of the United States on March 21, 1947 (5 USCA, § 631; 12 F.R. 1935; 3 C.F.R., 1943-1948 Comp., p. 627), was specifically revoked by executive order No. 10450 (5 USCA, § 631, 18 F.R. 2489; 3 C.F.R., 1953 Supp., p. 72), issued April 27, 1953 (almost two years prior to the enactment of § 3).

(2) The method followed by the attorney general for listing subversive organizations pursuant to executive order No. 9835 was held by the supreme court of the United States to be violative of the due process clause of the fifth amendment to the United States constitution in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624 (April 30, 1951), which was almost four years prior to the enactment of § 3.

(3) Section three purported to include "membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive." This would include organizations listed by him *in futuro ad infinitum*. Statutes attempting to adopt by reference future Federal rules, regulations or statutes are unconstitutional. *State ex rel. Kirschner* v. *Urquhart*, 50 Wn. (2d) 131, 310 P. (2d) 261 (1957).

Thus it is apparent that section three purported to adopt [fol. 57] unconstitutional findings of the attorney general, promulgated pursuant to an executive order, which had been revoked and superseded long prior to the enactment of the 1955 act. We cannot, under the guise of judicial interpretation, interject executive order No. 10450 (and the due process procedure provided for the listing of subversive organizations thereunder) into section three, contrary to the express terms thereof. This section is, therefore, unconstitutional and void. *State ex rel. Kirschner* v. *Urquhart, supra*. For these reasons, the result reached by the trial court is correct, and appellants' first assignment of error cannot be sustained.

Appellants next assign error to the trial court's conclusion that:

> "Section 4 of chapter 377, Laws of 1955, amends § 1, chapter 254, Laws of 1951, in that it adds a new category of subversive organization and of subversive activity. This section, therefore, embraces subjects not set forth in the title to chapter 377, Laws of 1955, and is, therefore, unconstitutional."

(It must be noted that the court's reference in this conclusion to "§ 1, chapter 254, Laws of 1951" is inaccurate, in that it overlooks the fact that section one was previously amended by Laws of 1953, chapter 142, § 1.)

Section four of the 1955 act provides:

> "The communist party is a subversive organization within the purview of RCW 9.81 and membership in the communist party is a subversive activity thereunder."

Apparently, the above quoted conclusion of the trial court is based on Art. II, § 19, of the Washington constitution, requiring that:

> "No bill shall embrace more than one subject, and that shall be expressed in the title."

If section four is in fact *amendatory* of a prior section of the subversive activities act, as the trial court concluded, it would also violate Art. II, § 37 of the Washington constitution, which provides:

> [fol. 58] "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."

Respondents' argument is that section four amends the definition of "subversive organization" (Laws of 1953, chapter 142, § 1; RCW 9.81.010) by establishing conclusively that the communist party is such an organization, thereby creating a "new and different crime" under Laws of 1951, chapter 254, § 3 (RCW 9.81.030). This contention is untenable.

Section four of the 1955 act is nothing more than the legislature's declaration of its recognition that the communist party falls within the definition of "subversive organization" contained in Laws of 1953, chapter 142, § 1. As such, it is supplementary rather than *amendatory*. Therefore, the sections of the act which it supplements need not be set out in full in order to satisfy the last mentioned constitutional requirement, because:

> ". . . If the amendatory act only adds a new section to the old act, only the new section need be set forth in the body of the amendatory act." 1 Sutherland, Statutory Construction (3d ed.), 407, § 1928.

See, also, *State* v. *Lawson*, 40 Wash. 455, 82 Pac. 750 (1905); *State ex rel. Washington Toll Bridge Authority* v. *Yelle*, 32 Wn. (2d) 13, 200 P. (2d) 467 (1948); *Bellingham* v. *Hite*, 37 Wn. (2d) 652, 225 P. (2d) 895 (1950).

Laws of 1955, chapter 377, is entitled:

> "An Act relating to subversive activities; requiring state, county and municipal employers to ask em-

> ployees under oath concerning memberships in *the communist party or other subversive groups;* and amending . . . " (Italics ours.)

The single subject of the entire act, "subversive activities," is "expressed in the title" as required by Art. II, § 19, of the state constitution. That part of the title above italicized characterized the communist party as a "subversive group" [fol. 59] and gives sufficient notice of the contents of section four.

We are of the opinion that the title of the 1955 act does not violate either of the constitutional provisions above discussed and that the trial court's conclusion, holding to the contrary, is erroneous.

Error is next assigned to the trial court's conclusion that:

> "Chapter 377, Laws of 1955, is unconstitutional in its entirety . . . because . . . §§ 3 and 4 of the chapter are not separable from the first two sections."

In *In re Hendrickson*, 12 Wn. (2d) 600, 123 P. (2d) 322 (1942), we recognized that the ultimate test of separability is the intention of the legislature, as determined by the court, and restated the rule to be:

> ". . . that the entire statute will fall where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning, and purpose that it cannot be believed that the legislature would have passed the one without the other, or where the portion eliminated is so intimately connected with the rest of the statute as to make it useless to accomplish any of the purposes of the legislature. [Citations.]"

Applying these principles to the 1955 act, we find that when sections one and two thereof are substituted for sections twelve and thirteen of the act of 1951, which they amend, the legislature has stated its intention in section eighteen of the original act that these sections be considered separable. While such a saving clause is not conclusive, it

does give us assurance that the legislature would have passed the act even though it knew that section three were to be eliminated. See *State ex rel. King County* v. *State Tax Commission*, 174 Wash. 336, 24 P. (2d) 1094 (1933). But apart from this, our analysis of the purpose of the several sections of the 1955 act clearly manifests the intention of the legislature that these sections be separable and are capable of functioning independently of each other.

[fol. 60] Sections one, two, and four of the 1955 act relate to subversive activities generally, and to the communist party particularly. Section three, however, pertains to subversive activities generally and, in particular, is nothing more than an abortive attempt on the part of the legislature to designate by reference about 250 other organizations as subversive within the definition contained in section one of the 1951 act, as amended by Laws of 1953, chapter 142, § 1 (*cf.* RCW 9.81.010). By designating the communist party as a subversive organization in section four, the legislature supplied the reason why it required in section one, as a condition of public employment, that every present and prospective public employee state, under oath, whether he or she was then a member of the communist party, except in nonsensitive occupations, as provided in section two. Obviously, sections one and four were designed to prevent any claim (which the legislature found to be entirely unfounded in fact) that the communist party was not, and is not, a "subversive organization" as defined in the 1951 act, as amended.

It is thus apparent that the invalidity of section three does not vitiate the remainder of the 1955 act. Absent section three, the entire subversive activities act (including the amendments made by section one, two, and four of the 1955 act) can be administered in precisely the same manner as with section three, with the single exception that no list of alleged subversive organizations prepared by the United States attorney general may be used to designate membership in proscribed organizations. Since section three of the 1955 act is clearly separable and a workable statute remains after its severance, we cannot sustain the above quoted conclusion of the trial court.

[fol. 61] Respondents further argue that "the state has no power to enact a subversive activities control statute." They cite *Pennsylvania* v. *Nelson*, 350 U. S. 497, 100 L. Ed. 640, 76 S. Ct. 477 (1956), wherein the defendant was charged and convicted in the Pennsylvania *state* court with an attempt to overthrow the government of the *United States* by force and violence contrary to the Pennsylvania sedition act of 1949. The United States supreme court (affirming the decision of the supreme court of Pennsylvania) there held that certain *Federal* legislation had pre-empted the field of sedition against the *United States*.[16] As we understand that case, the court did not hold, either expressly or by implication, that a sovereign state was precluded from enacting laws designed to suppress acts of sedition against the state itself. Moreover, the *Nelson* case had no relation whatever to, and did not involve, the power of a state to enact state laws and regulations prescribing qualifications prerequisite to public employment. But even if we assume, *arguendo*, that Federal legislation has pre-empted the field of sedition against both *Federal and state* governments, still that which has just been said above concerning separability of the 1955 act applies with equal force to the separability of the penal sections (§§ 2 and 3) of the 1951 act from those sections (§§ 1 and 2 of the 1955 act) prescribing qualifications for public employment.

Respondents complain that the statute[17] which requires them to execute the oath in question is a bill of attainder [fol. 62] and, as such, contravenes Art. I, § 23, of the state constitution and Art. I, § 10, of the United States constitution.[18] Their argument is substantially the same as that

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[16] See *State* v. *Diez* (Fla.) 97 So (2d) 105 (1957) for a comprehensive discussion of the inapplicability of the *Nelson* case to state statutes prescribing conditions precedent to public employment.

[17] Laws of 1951, chapter 254, § 12, as amended by Laws of 1955, chapter 377, § 1.

[18] "No bill of attainder, ex post facto law . . . shall ever be passed." Art. I, § 23, of the Washington constitution.

"No state shall . . . pass any bill of attainder, ex post facto law, . . ." Art. I, § 10, of the United States constitution.

rejected by this court in *Huntamer* v. *Coe*, 40 Wn. (2d) 767, 246 P. (2d) 489 (1952), wherein we held that section 16, as implemented by section 14(c), of the act of 1951 (requiring a similar oath as a condition precedent to filing a declaration of candidacy for any public office) was not unconstitutional for these reasons.

Section twelve of the 1951 act, as amended by Laws of 1955, chapter 377, § 1, requires only that every present or prospective public employee state, under oath, whether he or she is "a member of the communist party or other subversive organization" at the time the oath is taken. No punishment for past conduct or political activity is involved. Only one qualification precedent to public employment is imposed. In short, this section is clearly neither *ex post facto* nor in the nature of a bill of attainder. *Huntamer* v. *Coe*, *supra*; *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, 95 L. Ed. 1317, 71 S. Ct. 909 (1951); *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 413, 94 L. Ed. 925, 70 S. Ct. 674 (1949); *Pickus* v. *Board of Education of the City of Chicago*, 9 Ill. (2d) 599, 138 N. E. (2d) 532 (1956).

Nor do we find merit in respondents' assertion that section twelve, as amended, violates Art. I, § 9, of the Washington constitution[1] or that clause of the fifth amendment to [fol. 63] the United States constitution which provides that no person "shall be compelled in any criminal case to be a witness against himself." Respondents are not compelled by section twelve to do anything. But, if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, and their refusal to do so renders them ineligible for further employment.

Respondents also attack the oath requirement of the act, contending that it abridges their rights of freedom of speech and assembly protected by Art. I, §§ 4 and 5, of the Wash-

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[1] "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." Art. I, § 9, of the Washington constitution.

ington constitution,[20] and the first and fourteenth amendments to the United States constitution.[21]

Pickus v. *Board of Education of City of Chicago, supra,* was an action for a declaratory judgment and an injunction holding unconstitutional, and restraining the enforcement of, that section of the Illinois finance act of 1955 which required all public employees to execute a "non-communist affidavit" as a condition precedent to receiving compensation for their services from the state or its political subdivisions. In the course of its opinion, holding the section involved to be constitutional, the Illinois supreme court, [fol. 64] speaking through Chief Justice Klingbiel, said:

> "Plaintiffs assert that section 30b is an unwarranted denial of the right to speak. They fail to point out, however, the respect or way in which they consider such right to be involved here. The statute simply provides for the execution of an affidavit of fact. It does not purport to limit or restrict the right of employees to speak or assemble."

And, in *Albert Appeal,* 372 Pa. 13, 92 A. (2d) 663 (1952), a teacher in the Pittsburgh public school system was dismissed and her contract terminated by the board of education after a hearing on charges preferred by the superintendent of schools of Pittsburgh that she was a communist,

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[20] "The right of petition and of the people peacefully to assemble for the common good shall never be abridged." § 4.

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." § 5.

[21] "Congress shall make no law respecting an establishing of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Art. I.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Art. XIV, § 1.

and for "advocation of or participating in un-American or subversive doctrines." In affirming the decision dismissing the teacher's appeal, the court said:

> "There is no question of the right of free speech involved in this case. Miss Albert is not being penalized in her capacity *as a private citizen* because of any political, economic or social views she may entertain or any expression she may care to give to those views. The concern here is with her rights as a *teacher*, and the legislature can certainly prescribe qualifications for teachers in the public schools with respect not only to their academic attainments but also to their moral characters and their loyalty to the state and federal governments. Judge (later Mr. Justice) Holmes, in a characteristically epigrammatic phrase, said in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517: 'The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.' To the same effect, Mr. Justice Minton, speaking for the United States Supreme Court, said in *Adler v. Board of Education of the City of New York*, 342 U. S. 485, 492 [96 L. Ed. 517, 524, 27 A.L.R. (2d) 472, 476 (1952)]: 'It is clear that such persons [employed or seeking employment in the public schools] have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the State in the school system on their own terms. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.'"

After stating the matter just quoted, the United States supreme court, in the *Adler* case, went on to say:

> "If, under the procedure set up in the New York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed [subversive] organization,

> he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or [fol. 65] assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence."

In *Fitzgerald* v. *Philadelphia*, 376 Pa. 379, 102 A. (2d) 887 (1954), a nurse, who had been dismissed from her employment in the Philadelphia General Hospital for declining to take the oath required by section five of the Pennsylvania loyalty act of 1951,[22] sought reinstatement. In affirming a judgment adverse to her, the supreme court of Pennsylvania said:

> "We do not understand that appellant argues—or indeed could argue—that the Commonwealth or any of its political subdivisions cannot refuse employment, or discontinue it, in the case of anyone who is knowingly a member of a subversive organization. It would be intolerable for any government to retain in its employ one who advocates its overthrow by force or violence or knowingly consorts with others in an organization having such an objective. What we held in *Albert Appeal*, 372 Pa. 13, 92 A. (2d) 663, and what the Supreme Court of the United States held in *Adler* v. *Board of Education of the City of New York*, 342 U. S. 485, in regard to teachers applies equally to all public employes, namely, that the legislature, as a condition of their employment, may prescribe qualifications with respect not only to their general attainments but also to their moral character and their loyalty to the state and federal governments, and, to that end, may deny them public employment if they are knowingly members of a disloyal and seditious organi-

[22] It is significant to note that the statute there involved is strikingly similar to section twelve of the subversive activities act which is involved in this case.

zation. . . . That being so, the oath prescribed by the 1951 Act is obviously justified for the purpose of informing the appointing authority as to whether the employe is in fact a member of an organization which he knows is subversive in character and therefore is not a fit person to be entrusted with the duty of supporting and advancing the interests of the very government whose destruction he is seeking to accomplish."

Shortly after this case was argued in this court, the supreme court of the United States rendered its decisions in *Beilan* v. *Board of Education*, 357 U. S. 399, 2 L. Ed. (2d) 1414, 78 S. Ct. 1317 (1958), and *Lerner* v. *Casey*, 357 U. S. 468, 2 L. Ed. (2d) 1423, 78 S. Ct. 1311 (1958). In the former, a teacher was discharged by the board of educa- [fol. 66] tion on its finding of "incompetency" because of his refusal to answer questions relating to his past communistic affiliations and activities. In upholding the decision of the Pennsylvania supreme court, sustaining the board's action, the United States supreme court carefully pointed out that the teacher was discharged not for disloyalty, but for "incompetency," and that such discharge did not violate the due process clause of the fourteenth amendment.

In the *Lerner* case, the court upheld a judgment of the New York court of appeals, which had the effect of sustaining the dismissal of a subway conductor, employed by the New York City Transit Authority, who, when asked (by the commissioner of investigation of New York city) whether he was *then* a member of the communist party, refused to answer, claiming his privilege against self-incrimination under the fifth amendment. He was subsequently suspended, and later discharged. A finding "that, upon all the evidence, reasonable grounds exist for belief that, because of his doubtful trust and reliability . . . [his] continued employment would endanger national and state security," was based on his refusal to answer the question asked. The supreme court accepted the reasoning of the court of appeals that the city employee had been discharged neither

"... because of any inference of Communist Party membership which was drawn from the exercise of the Fifth Amendment privilege [which, the court pointed out, was not available to appellant through the fourteenth amendment in this city investigation], nor because of the assertion of that constitutional protection, but rather because of the doubt created as to his 'reliability' by his refusal to answer a relevant question put by his employer, ..."

Like the *Lerner* case, *supra*, the question which section twelve of our 1951 act, as amended in 1955, requires respondents to answer is whether or not they *are* members of the *communist party*, or other subversive organization. [fol. 67] That the communist party was, in fact, a subversive organization, as defined in the 1951 act, at the time that our legislature designated it as such (by § 4 of the 1955 act) can scarcely be doubted. (See appendix C.)

Even prior to the commencement of hostilities in Korea in 1950, numerous judges had recognized the communist party as a part of a world conspiracy having as its prime objective the overthrow of the United States government, by force and violence, or whatever means possible, constitutional or otherwise.[23] Since then, Congress, in 1950, enacted legislation designed to control the communist party,[24] and, in 1954, proscribed it.[25] The courts of New Jersey[26] and Pennsylvania[27] take judicial notice of the fact.

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[23] E.g., Concurring opinion of Mr. Justice Jackson in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 674; dissenting opinion of Mr. Chief Justice Stone in *Schneiderman* v. *United States*, 320 U. S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 (1942); dissenting opinions in *State ex rel. Huff* v. *Reeges*, 5 Wn. (2d) 637, 106 P. (2d) 729 (1940).

[24] Title I (the subversive activities control act of 1950) of the internal security act of 1950 (the McCarran act) of September 23, 1950, 64 Stat. 987, 50 U.S.C.A., § 781, *et seq.*

[25] Communist control act of 1954 of August 24, 1954, 68 Stat 775, 50 U.S.C.A., § 841, *et seq.*

[26] *Isaba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. (2d) 273 (1957).

[27] *Albert Appeal*, 372 Pa. 13, 92 A. (2d) 663 (1952).

We can, and do now, hold likewise, because the fact that the Communist party is a subversive organization is now a matter of common knowledge.

It is settled law that the state may inquire of its employees regarding matters that may prove relevant to their fitness and suitability for public service. *Adler* v. *Board of Education, supra; Garner* v. *Los Angeles Board of Public Works, supra.* Particularly is this true with re- [fol. 68] spect to the employment of teachers in its public schools and institutions of higher learning. The reasons compelling this conclusion are aptly pointed out by the New Jersey supreme court in *Laba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. (2d) 273 (1957), which quoted with approval from *Thorp* v. *Board of Trustees of Schools for Industrial Education*, 6 N. J. 498, 79 A. (2d) 462 (1951), judgment vacated as moot, 342 U. S. 803, 72 S. Ct. 35, 96 L. Ed. 608 (1951), as follows:

> "The maintenance of the purity of the educational process against corruption by subversive influences is of the highest concern to society. It is in no real sense a denial of academic freedom to require of a teacher, as a condition to employment, a sworn disavowal of allegiance to the doctrine of force or violence as a mode of overthrowing government. That would seem to be axiomatic. Loyalty to government and its free democratic institutions is a first requisite for the exercise of the teaching function. Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualifications. The apprehended danger is real and abiding. We have long had evidences of the pressure here of a godless ideology ruthlessly fostered by a foreign power which has for its aim the violent overthrow of government and free society. And one of its weapons is the debasement of teaching as a softening measure in the consummation of the subversive process. The school system affords the opportunity and means for subtle infiltration. *There is no intrusion upon personal freedoms when government intervenes, as it has here, to avert*

this peril to its very existence. A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching. The teacher is not obliged to take the oath; but if he refuses to do so he is not entitled to teach. In the current struggle for men's minds, the State is well within its province in ensuring the integrity of the educational process against those who would pervert it to subversive ends." (Italics ours.)

In *Adler* v. *Board of Education, supra*, the supreme court said:

"... A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. *In this, the state has a vital concern.* It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of [fol. 69] officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." (Italics ours.)

In this case, because of their positions in a "sensitive" area, each respondent is required, by section twelve of the 1951 act, as amended in 1955, to state, upon oath, whether he is a member of the communist party or other subversive organization.

The foregoing authorities clearly hold that, without violating any of the constitutional rights here invoked by respondents, the state is entitled to ask this question and to demand an answer as a condition of continued employment. Refusal to answer is sufficient grounds for discharge, whether it be for "incompetency" (*Beilan* v. *Board of Education, supra*), or because by his lack of candor he provides evidence of his "doubtful trust and reliability." (*Lerner* v. *Casey, supra.*)

Respondents also contend that the form of oath which appellants demanded that they sign violates the due process clause of the fourteenth amendment[28] to the United States constitution, and Art. I, §§ 3 and 12,[29] of the state constitution, in failing to include the element of *scienter* of the subversive character of a subversive organization on the part of the prospective affiant. As we interpret the form of oath, we find that this element is implied in every clause thereof and of the pertinent statutory provisions. See *Garner* v. *Board of Public Works of Los Angeles, supra.* As so construed, the case for *Wieman* v. *Updegraff, supra,* on which respondents rely, has no application.

[fol. 70]

Conclusion

No authority, state or Federal, has been called to our attention (and we have discovered none from our own research) holding either:

(a) That the states have been deprived of their control over public schools or institutions of higher learning operated by them, including the power to protect the students therein against the possible exertion of subversive influence by their teachers or other instructors; *or*

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[28] See note 21, *supra.*

[29] "No person shall be deprived of life, liberty, or property without due process of law." Art. I, § 3, of the Washington constitution.

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Art. I, § 12, of the Washington constitution.

(b) That the states have been deprived of the right to investigate the qualifications (including loyalty) of their employees who are paid by public funds.

In the absence of such authority, this court must hold that all of the provisions of the Laws of 1955, chapter 37, *except* section three thereof, are a valid exercise of the sovereign power of the state for the protection of the state of Washington and its existing educational institutions, and their respective students, under the tenth amendment to the United States constitution, reading as follows:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

We are further of the opinion that the 1955 act (except § 3) does not in any respect contravene any of the provisions of our state constitution or of the United States constitution which have been invoked by respondents.

It follows from what has been said herein that the action of appellants in demanding that respondents sign the form of oath attached to the complaint was correct.

The decree of the trial court is reversed with directions [fol. 71] to dissolve the permanent injunction restraining appellants from performing their official duties under the 1955 act (except § 3) with respect to respondents and to dismiss their action.

Neither party shall be allowed costs in this court.

Donworth, J.

We Concur: Weaver, C. J., Mallery, J., Hill, J., Finley, J., Rosellini, J., Ott, J., Foster, J., Hunter, J.

[fol. 72]

Appendix A

I.

Excerpts from House Concurrent Resolution No. 10, Laws of 1947, p. 1378.

"*Whereas*, These are times of public danger; subversive persons and groups are endangering our domestic unity, so as to leave us unprepared to meet aggression, and under cover of the protection afforded by the bill of rights these persons and groups seek to destroy our liberties and our freedom by force, threats and sabotage, and to subject us to the domination of foreign powers; and

"*Whereas*, Recent announcements by responsible officers of the federal government indicate the seriousness of the problem. J. Edgar Hoover, Director of the Federal Bureau of Investigation,* recently said: 'During the past five years American Communists have made their deepest inroads upon our national life. Their propaganda, skillfully designed and adroitly executed has been projected into practically every phase of our national life. The Communist influence has projected itself into some newspapers, books, radio and the screen, some churches, schools, colleges and even fraternal orders have been penetrated, not with the approval of the rank and file, but in spite of them'; and

"*Whereas*, State legislation to meet the problem and to assist law enforcement officers can best be based on a thorough and impartial investigation by a competent and active legislative committee;

* In 1957, after nearly forty years' experience in dealing with communist activities in the United States, Mr. Hoover reported to the American public on this subject in "Masters of Deceit" (Library of Congress Catalog Card No. 58-7643). For a description of communist party operations in the United States, see parts II, III, and IV.

"*Now, Therefore, Be It Resolved,* That there is hereby created a Joint Legislative Fact-finding Committee on Un-American Activities in the State of Washington which shall investigate, ascertain, collate and appraise all facts concerning individuals, groups or organizations whose activities are such as to indicate a purpose to foment internal strife, discord and dissension; infiltrate and undermine the stability of our American institutions; confuse and mislead the people; and impede the normal progress of our state and nation either in a war time or a peace time economy; and

"*Be It Further Resolved,* That in addition to other duties imposed upon the committee, the committee shall investigate the activities of groups and organizations whose membership includes persons who are communists, or any other organization known or suspected to be dominated or controlled by a foreign power, which activities affect the conduct of this state, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions of this state supported in whole or in part by state funds, or any political program; and

"*Be It Further Resolved,* That the committee shall consist of four members of the House of Representatives, appointed by the speaker thereof; and three members of the Senate appointed by the president thereof and they shall be subject to confirmation of [fol. 73] their respective bodies. The speaker of the House of Representatives shall appoint the chairman of the board; and

"*Be It Further Resolved,* That the committee hereby created . . . shall have . . . all powers necessary or convenient to accomplish the objects and purposes of this resolution, including but not limited to the following duties and powers: . . .

"(5) To hold public hearings at any place in the State of Washington at which hearings the people are to have an opportunity to present their views to the committee;

"(6) To make a complete study, survey, and investigation of every phase of the subject of this resolution, including but not limited to the operation, effect, administration, enforcement, and needed revision of any and all laws in anywise bearing upon or relating to the subject of this resolution;

"(7) To meet at any and all places in this state, in public or executive session;

"(8) To act during this session of the legislature, including any recess hereof, and after final adjournment hereof until commencement of the thirty-first legislature;

"(9) To file a report with the thirty-first legislature; . . . "

Appendix B

I.

Pertinent prefatory remarks of the Joint Fact-Finding Committee on Un-American Activities in the State of Washington addressed to the Speaker of the House of Representatives and the Thirtieth Legislature, contained in the First Report, Un-American Activities in Washington State, 1948, are as follows:

"The testimony and evidence in the first hearings prove conclusively, in the judgment of your Committee, that:

"1. Communists in the State of Washington operate under, and undeviatingly follow, policies laid down for them by the Soviet government.

"2. These policies are promulgated on a nation-wide basis and that the activities of Communists in the State of Washington are coordinated with Communist activities in the other states of the union.

"3. The dovetailed nation-wide program is designed to create distrust of their form of government in the minds and hearts of the American people; create un-

rest and civil strife, and impede the normal processes of state and national government, all to the end of weakening and ultimately destroying the United States as a constitutional republic and thereby facilitating the avowed Soviet purpose of substituting here a totalitarian dictatorship.

"Fantastic as this may appear to the uninitiate and the naive, the testimony produced at the public hearings clearly brings into view the extreme danger of the Soviet directed Communist conspiracy to the peace and security of the people of the State of Washington and the United States."

II.

Salient prefatory remarks of the above mentioned committee addressed to the Thirty-first Legislature of the State of Washington, contained in the Second Report, Un-[fol. 74] American Activities in Washington State, 1948, are:

"The hearing, conducted by a legally appointed committee of the legislature, met with much resistance and actual sabotage in its proceedings. Under the guise of a 'picket line' Communist inspired marchers surrounded the 146th Field Artillery Armory, scene of the hearing, and raised their voices in shouting in an obvious attempt to drown out the testimony of witnesses.

"Seattle police arrested ringleaders of the demonstrations on charges of disorderly conduct. Joint efforts of Seattle police and the State Patrol were necessary to quell the disturbances so that your Committee could carry on its hearings in an orderly manner.

"While the number of University faculty members exposed as having or having had Communist Party affiliations was relatively small compared with the actual size of the faculty, the hearing developed that the pattern of Communist infiltration was identical with that employed by the Communists in other fields.

"In virtually every field in which they ultimately have been the dominating influence the Communists

start with a small but active minority who almost invariably conceal their affiliations and operate as so-called 'liberals.'

"Your Committee wishes to direct particular attention to the testimony concerning not only the University of Washington but to the proven Communist domination of the Repertory Playhouse, an off-campus school of the drama, which has drawn many of its students from the University. Testimony concerning the affiliation of the leadership of this school with Communist activities is preponderant, and, to the uninitiate, startling in the extreme."

III.

Excerpts from the Report of Un-American Activities Committee to the Thirty-first Legislature of the State of Washington (House Journal, 1949, p. 1095, *et seq.*):

"... The State of Washington is acrawl with trained and iron disciplined Communists. They have operated here with seeming immunity. Many of them hold almost impregnable positions of confidence and trust in their communities. They have successfully infiltrated their constant objectives, education, government, labor and municipal services. They effectively operate and manipulate an incredible maze of propaganda outlets known as Communist Front Organizations.

"If the Communists are permitted to work unhampered a short time more in American education, the significance of our historic background will be almost completely lost to a generation of Americans. Our endeavors in uncovering Communist activity in education were largely confined to disclosure of evidence showing that Communists agents are being employed by this state in tax supported institutions.

"We did not at this time investigate to any great extent the substance of any teaching. We felt it sufficient to disclose the aims of the Communists in education and point out the rigid discipline and control held by the Party over its members. It then becomes obvi- [fol. 75] ous that a member of the Communist Party

could not possibly shed his communism on entering the classroom. That as a Communist he is dedicated to the overthrow of the system and state employing him. That as a Communist he has subordinated his belief in academic freedom to the will of the Communist Party. By his own consent he is no longer a free agent and when he talks of academic freedom and civil rights it becomes the rankest hypocrisy. . . .

"Early in our investigations it became apparent that a large and well-organized group of disciplined Communists are operating in the State of Washington and have been for many years. These Communists are agents of Soviet Russia through their membership and strict loyalty to the Communist Party. Some are aliens, more are American born, but all are alike in their undeviating obedience to the dictates of the Kremlin laid down to them in what is known as the Party Line.

"Every Communist and Communist sympathizer is a potential saboteur and spy and it is the rankest nonsense to finance this program of self-destruction with public funds. An alarming number of Communists are on federal, state and municipal payrolls.

"The predatory nature of the world Communist Party is well attested to by many former Communists in the transcripts of our two public hearings which are appended to and made a part of this report. They are identified as 'First Report on Un-American Activities in Washington State' and 'Second Report on Un-American Activities in Washington State.'

"In addition to the printed reports of testimony taken at our two public hearings, the Committee has accumulated an index file of approximately 40,000 subjects dealing with Communists, their Front Organizations and activities and related materials. In the case of notorious Communists such as . . . [certain persons named], their cards may have scores of individual notations and cross references. We have found a pattern of Communist intrigue and conspiracy of alarming proportions extending over the State of Washington and the Pacific Northwest like a huge spider web. The cables of this web are imbedded deep in federal,

state, and municipal government, all levels in education, state welfare programs, labor organizations and religion. . . .

"While engaged in an intensive investigation in these two fields of Communist activity, it became increasingly apparent that all Communist activity in all fields is interrelated. That Communist agents while assigned to different projects are all dedicated to the same objective; the softening up of our people for the eventual violent overthrow of our government. That they work as a team taking their orders from the top, and that they do not deviate in the minutest detail from the Party Line and Party instructions. This may involve the following out of some minor Party assignment in a labor organization, outside speaking engagements for a university professor, or obedience to accepted Party conduct before a legislative hearing. No deviation from Party instructions is permitted—none occurs. . . .

(For the committee's remarks concerning "Academic Freedom," particularly with reference to its investigation of subversive activities at the University of Washington, see that subheading in its report commencing on page 1110 [fol. 76] (House Journal, 1949), and the letter of Raymond B. Allen, then president of the University of Washington, set out at length therein.)

Continuing the quote from the aforementioned report, at page 1117 of the House Journal (1949):

"J. Edgar Hoover is one of the outstanding and most vocal enemies of the Communists and has repeatedly stated that the members of the Communist Party in America are fifth column agents representing a hostile government. . . .

"In reply to a question regarding the initiation of criminal prosecutions by the FBI in cases where federal employees failed to disclose Communist Party affiliations, Mr. Hoover stated:

"'Criminal prosecutions are initiated in proper cases, but not by the FBI. That is a responsibility of the

prosecuting officials of the Department of Justice and the various United States attorneys. It's not a simple matter to prove that one is a Communist. In fact, the most dangerous Communists in the nation today are not the open, avowed, card-carrying Party members. They seek to attach themselves to liberal and progressive movements. They conceal their real Communist affiliations, because they know that once exposed they will outlaw themselves in the hearts and minds of Loyal Americans. A real Communist supporter can be identified by his acts—he follows his party line, espouses the Party's causes and often furthers its aims by his overt acts.

"The Communist Party has long regarded infiltration of the government service as a project carrying highest priority. They have sought to accomplish this under the guise of secrecy. The menace of Communists in government service is a threat to our national security because of (1) opportunity to engage in espionage to the detriment of our national defense; (2) opportunity to influence the formulation and carrying out of governmental policies; (3) opportunity to promote Communist propaganda, creating disruption and undermining public confidence; (4) opportunity to recruit Party members in government service, or soliciting the aid of innocent co-workers in assisting them to carry out Party assignments; and (5) opportunity to place other Communists in government service. One person whose loyalty to the Communist cause exceeds his loyalty to the United States could, if properly placed, do irreparable harm to our security."

The committee recommended, *inter alia*:

"(11) To press with all vigor and energy and all its resources the investigation into Communism in our tax-supported schools, both common schools and institutions of higher learning. Communists already have made salutary inroads into our education system. Testimony, including that of high ex Communists, in the first and second committee reports, disclose the alarming progress that has been made.

"In the blue print for Communist infiltration the Communist objective is summed up in these simple words:

"'In destroying the capitalist monopoly of the means of production, the working class must also destroy the capitalist monopoly of education; that is, it must take possession of all the schools, from the elementary schools to the universities.' (Program of the Communist International, adopted by the Sixth World [fol. 77] Congress, Sept. 1, 1928, Moscow. 'Blue Print for World Conquest,' page 206.)

"As heretofore stated, your Committee had opportunity merely to scratch the surface of Communist infiltration in our tax-supported school system.

"(12) The successor committee, or a separate committee, be authorized to fully investigate the manner in which textbooks and all other reading matter in our schools is chosen and approved, and that the Legislature make it mandatory to either delegate existing agencies or create a separate agency with the responsibility of stemming the flow of subversive reading matter that is finding its way into some of the classrooms of our schools."

Appendix C

I.

Schwartz, the Supreme Court, chapter 9, page 317:

"Perhaps the most striking judicial statement of the actual character of the American Communist Party is to be found in a 1950 opinion of Justice Jackson [concurring opinion in *American Communications Ass'n v. Douds*, 339 U. S. 382, 413, 94 L. Ed. 925, 70 S. Ct. 674 (1949)], which is remarkable for the breadth of its language and its judicial notice of data not in evidence before the Court.

"From information before its several Committees [reads the opinion referred to], and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist

Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. A rough and compressed grouping of this data would permit Congress to draw these important conclusions as to its distinguishing characteristics.

"1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. . . .

"2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. . . .

"3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. It would be incredible naivete to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power.

"4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement. . . .

"5. Every member of the Communist Party is an agent to execute the Communist program.

"Although unsupported by the kind of evidence that would usually be required in a law court, the broad indictment of the Communist Party in Justice Jackson's opinion comports with the common sense of the subject. . . ."

II.

Report of (United States) House of Representatives [fol. 78] Committee on Un-American Activities relative to the Internal Security Act of 1950 (House Report No. 2980, dated August 22, 1950):

"NECESSITY FOR LEGISLATION

"The need for legislation to control Communist activities in the United States cannot be questioned.

"Over 10 years of investigation by the Committee on Un-American Activities and by its predecessor committee has established (1) that the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institution in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

"The Communist program of conquest through treachery, deceit, infiltration, espionage, sabotage, corruption, and terrorism has been carried out in country after country and is an ever-growing threat to the national security of this and other countries. There is ample evidence that one of the primary objectives of the world Communist movement, directed from within the most powerful existing Communist totalitarian dictatorship, is to repeat this pattern in the United States.

"There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement, in its ruthless and tireless endeavor to advance the world march of communism.

"The findings which support these conclusions, and the vast quantity of evidence on which they are based, are set forth in detail in the numerous reports which this committee and its predecessors have printed and circulated. Corroboration has been supplied by inde-

pendent and exhaustive research by other committees of Congress.

"Concern over this threat is not limited to the legislative branch of our Government. At the present time 30 of the 70 major countries in the world have outlawed the Communist Party. Many other countries have adopted various legislative decrees against communism, and since 1947 the trend has been toward declaring all Communist activities illegal. Panama was the latest to take such action. This action came in April of this year. . . .

"Concern over the Communist threat has not been overlooked by the different State legislatures. At the present time 33 States have laws against the displaying of the 'Red' flag; 12 States have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; 16 have laws against the Communist Party candidates appearing on the election ballot; 19 States exclude Communists from public employment; 28 States require loyalty oaths of all employees; and 20 States require teachers to take loyalty oaths."

[fol. 79] III.

Communist Control Act of 1954, August 24, 1954, chapter 886, § 2, 68 Stat. 775, 50 U.S.C.A., § 841.

"Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no

part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed."

[fol. 84] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34451

HOWARD L. NOSTRAND and MAX SAVELLE, Respondents,

vs.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING, and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington; and JOHN J. O'CONNELL, Attorney General, State of Washington, Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 28, 1959

I. Notice is hereby given that Howard L. Nostrand and Max Savelle, respondents above named, hereby appeal to the Supreme Court of the United States from final judgment of the Supreme Court of the State of Washington, reversing the judgment of the Superior Court of the State of Washington for Thurston County with directions to dissolve the permanent injunction restraining the appellants from performing their official duties under Chapter 377, Laws of 1955, Laws of the State of Washington (except §3) with respect to the respondents and to dismiss their action, dated and entered in this action on March 20, 1959.

This appeal is taken pursuant to 28 USC Sec. 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 85] Summons and Complaint.

Motion and Affidavit for Temporary Restraining Order and Order to Show Cause.

Answer.

Affidavit of Service by Mailing.

Motion to Continue Restraining Order and Order to Show Cause.

Request for Admissions of Fact.

Reply to Request for Admissions of Fact.

Findings of Fact and Conclusions of Law.

Final Decree.

Notice of Appeal.

Praecipe.

Clerk's Certificate.
(The above comprises the transcript on appeal to the above-entitled court).

Petition for Rehearing.

Order Denying Rehearing.

Judgment of the Supreme Court of the State of Washington, Journal Volume 43, page 194, entered March 20, 1959.

En Banc Opinion of January 29, 1959.

Certificate of Chief Justice Weaver, dated May 28, 1959.

Motion and Order for Stay of Proceedings.

Bond to Stay Proceedings.

Notice of Appeal to the Supreme Court of the United States.

[fol. 86] III. The following questions are presented by this appeal:

(1) Does the State's requirement of an oath pursuant to Chapter 377, Laws of the State of Washington of 1955, of non-membership in the Communist Party or other subversive organization as a condition for any employment by the State violate the due Process guarantee of the 14th Amendment to the United States Constitution because no hearing is afforded

the employee as to the character of the subversive organization or as to the character of his membership therein?

(2) Does such oath requirement violate the 1st and 14th Amendments to the Constitution of the United States in that it abridges freedom of speech, freedom of association and assembly?

(3) Does such oath requirement violate Section 10, Article 1, of the Constitution of the United States in that it constitutes a Bill of Attainder?

(4) Does such requirement violate the 5th and 14th Amendments to the Constitution of the United States in that it compels the employee to incriminate himself?

(5) Does such oath requirement violate the 14th Amendment to the Constitution of the United States in that it deprives respondent of property without due process of law?

(6) Does such oath requirement violate the 14th Amendment to the Constitution of the United States in that it legislatively penalizes a State employee without notice, charges or hearing?

(7) Does such oath requirement violate the 14th Amendment of the Constitution of the United States in that it penalizes membership in the communist party rather than acts constituting a substantive evil?

(8) Does such oath requirement, violate the 14th Amendment to the Constitution of the United States in that it penalizes a State employee for membership in the communist party even in absence of his knowledge that the communist party has for its purpose the violent overthrow of the government?

(9) Does such oath requirement violate the 14th Amendment of the Constitution of the United States in that it affords no opportunity to an employee to explain or defend (1) the reason or basis of his

membership in the communist party; or other subversive organization; or (2) the reason or basis for his failure or refusal to take such oath?

[fol. 87] (10) Does such oath requirement violate the 14th Amendment to the Constitution of the United States in that it conclusively presumes that membership in the communist party is grounds for dismissal of a State employee?

(11) Does such oath requirement violate the 14th Amendment of the Constitution of the United States in that it requires discharge of a State employee solely upon refusal to Subscribe the oath and without notice, charges and hearing?

Solie M. Ringold, Francis Hoague, Attorneys for Howard L. Nostrand and Max Savelle, Respondents.

Copy received this 28th day of May, 1959.

John J. O'Connell, Attorney General; By Herbert H. Fuller, Asst. atty. Gen., 320 Alaska Building, Seattle 4, Washington.

[fol. 88] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 34451

HOWARD L. NOSTRAND and MAX SAVELLE, Respondents,

vs.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington, CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, Appellants.

STIPULATION AND ORDER ENLARGING TIME IN WHICH TO DOCKET APPEAL AND FILE RECORD IN THE SUPREME COURT OF THE UNITED STATES—July 17, 1959

It is hereby stipulated by the parties hereto through their attorneys that Howard L. Nostrand and Max Savelle, respondents herein, may have until August 30, 1959 to docket their appeal and file the jurisdictional statement and record on appeal in the Supreme Court of the United States.

This stipulation and order are based on Rule 13 (1) of the Rules of the Supreme Court of the United States.

Francis Hoague, Solie Ringold, Attorneys for Respondents.

Herbert H. Fuller, Acting Chief Asst. Attorney General of the State of Washington for the Appellants.

ORDER

It is hereby ordered that the time in which respondent is required to docket its appeal in the Supreme Court of the United States, and file the jurisdictional statement and [fol. 89] record on appeal is enlarged until August 30, 1959.

Dated this 17th day of July, 1959.

Frank P. Weaver, Chief Justice.

Approved as to form and content;
consent to entry and notice of
presentation waived

John O'Connell, Attorney General; By Herbert H. Fuller, Acting Chief Asst., Attorneys for Appellants.

Presented on behalf of attorneys
for respondents

By ....., Attorneys for Appellants.

[fol. 92] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 93]

SUPREME COURT OF THE UNITED STATES

No. 342—October Term, 1959

HOWARD L. NOSTRAND, et al., Appellants,

vs.

THOMAS BALMER, et al.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

ORDER NOTING PROBABLE JURISDICTION—October 26, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Office-Supreme Court, U.S.
FILED
AUG 24 1959
JAMES R. BROWNING, Clerk

No. 342

In the

Supreme Court of the United States

OCTOBER TERM, 1959

HOWARD L. NOSTRAND and MAX SAVELLE, *Appellants*,

vs.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Respondents*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

SOLIE M. RINGOLD
1201 Dexter Horton Building,
Seattle 4, Washington.

FRANCIS HOAGUE
320 Alaska Building,
Seattle 4, Washington.
Attorneys for Appellants

THE ARGUS PRESS, SEATTLE

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1959

HOWARD L. NOSTRAND and MAX SAVELLE, *Appellants*,

vs.

THOMAS BALMER, HAROLD S. SHEFFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Respondents*.

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STATEMENT AS TO JURISDICTION

SOLIE M. RINGOLD
1201 Dexter Horton Building,
Seattle 4, Washington.

FRANCIS HOAGUE
320 Alaska Building,
Seattle 4, Washington.
Attorneys for Appellants

THE ARGUS PRESS, SEATTLE

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In the
Supreme Court of the United States

OCTOBER TERM, 1959

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No.....

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

JURISDICTIONAL STATEMENT

Appellants' appeal from the judgment of the Supreme Court of the State of Washington entered in this action on March 20, 1959, reversing in part the judgment of the Superior Court of the State of Washington for Thurston County, and submit this statement in support of their contention that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington has not yet been officially reported; it appears unofficially at 153 Wash. Dec. 431, 335 P.(2d) 10 (1959), and is annexed hereto as Appendix A. The Superior Court of the State of Washington for Thurston County did not render an official or unofficial opinion.

JURISDICTION

Appellants Howard L. Nostrand and Max Savelle, two professors employed by the State of Washington under yearly contract to teach at the University of Washington, commenced this action pursuant to Section 7.24.010 et seq., Revised Code of Washington, for the purpose of obtaining a declaratory judgment adjudicating Chapter 377, Laws of Washington of 1955, which required execution of a non-subversive oath of all state employees on penalty of dismissal, to be violative of several provisions of the Constitution of the United States and of the State of Washington, and seeking a permanent injunction enjoining the enforcement thereof (Tr. 3-8). The Superior Court found that Chapter 377 violated the Constitution of the State of Washington and issued an injunction permanently restraining the enforcement or administration of its provisions (Tr. 34). The Supreme Court of the State reversed in part, upholding the validity of all of Chapter 377 under both the United States and Washington Constitutions with the exception of Section 3 of said Chapter, and remanded the case to the Superior Court with directions to dissolve the permanent injunction

except as to Section 3 and to dismiss the action (Tr. 47). A copy of the judgment of the Supreme Court of Washington is annexed as Appendix B. Judgments of the Supreme Court of Washington are final as to all parties. R.C.W. 2.04.220 (1951). On February 26, 1959, a petition for rehearing (Tr. 41-45) was filed with the Supreme Court of Washington, which was denied on March 20, 1959 (Tr. 46). Notice of Appeal to this Court was filed in the Supreme Court of Washington on May 28, 1959 (Tr. 84-87). Time for docketing the case was enlarged to extend to August 30, 1959, by stipulation and Order of the Chief Justice of the Supreme Court of Washington, entered July 17, 1959 (Tr. 88-89).

The statute drawn into question on the ground that it is repugnant to the United States Constitution, is Chapter 377, Laws of Washington, 1955, Revised Code of Washington, Sections 9.81.070 through 9.81.083. The most pertinent parts of this Chapter are as follows:

> Sec. 1. "Every person and every board, commission council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees . . . shall require every employee . . . to state under oath whether or not he or she is a member of the Communist Party or other subversive organization, and refusal to answer *on any grounds* shall be cause for immediate termination of such employee's employment . . ." (Emphasis supplied)
>
> Sec. 4. "The Communist Party is a subversive

organization within the purview of R.C.W. 9.81 and membership in the Communist Party is a subversive activity thereunder."

This Act has reference to and is defined by other sections of R.C.W. 9.81. These statutory provisions are lengthy and therefore are set forth in Appendix C. The oath demanded of appellants is set forth in Appendix D.

The decision of the highest court of the State of Washington sustained the validity of Chapter 377 under the United States and Washington Constitutions (with the exception of Section 3). For this reason, this Court has jurisdiction on appeal. 28 U.S.C. Sec. 1257(2); *Wieman v. Updegraff*, 344 U.S. 183, 73 S. Ct. 215, 97 L. ed. 216 (1952); *Slochower v. Board of Education*, 350 U.S. 551, 76 S. Ct. 637, 100 L. ed. 692 (1955).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Does the State's requirement of an oath pursuant to Section 1, Chapter 377, Laws of the State of Washington of 1955, of non-membership in the Communist Party or other subversive organization as a condition for state employment violate the Fourteenth Amendment to the United States Constitution in that it requires automatic discharge of a state employee solely upon his refusal to subscribe the oath and no hearing is afforded the employee at which he can explain or defend (a) the reason, nature or basis of his member-

ship in the Communist Party, or other subversive organization; or (b) the reason or basis for his failure or refusal to take such oath?

2. Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States in that it legislatively penalizes a State employee without notice, charges or hearing?

3. Does such oath requirement violate Section 10, Article I, of the Constitution of the United States in that it constitutes a Bill of Attainder?

4. Does such oath requirement violate the 14th Amendment to the Constitution of the United States in that it conclusively presumes that membership in the Communist Party is by itself grounds for dismissal of a State employee?

5. Does such oath requirement violate the 14th Amendment of the Constitution of the United States in that it penalizes membership in the Communist Party rather than acts consituting a substantive evil?

6. Does such oath requirement violate the 14th Amendment to the Constitution of the United States in that it penalizes a State employee for membership in the Communist Party even in absence of his knowledge that the Communist Party has for its purpose the violent overthrow of the government?

7. Does such oath requirement violate the 1st and 14th Amendments to the Constitution of the United States in that it abridges freedom of speech, freedom of association and assembly?

STATEMENT OF THE CASE

The appellants are two professors, employed under contract by the State of Washington to teach at the University of Washington (Tr. 31). The respondents, the University Board of Regents, president and vice-president, and the State Attorney General are charged with the duty of establishing, enforcing, carrying out and administering the provisions of Chapter 377, Laws of 1955 (Tr. 32).* The respondents have demanded that appellants sign and swear to an oath, a copy of which appears at Appendix D hereto (Tr. 32). The appellants in their petition allege that unless they comply with such demands, their employment contracts with the University will be terminated as required by Chapter 377 (Tr. 6, 49). The statute provides no opportunity for explanation or hearing.

Chapter 377, Laws of 1955 is comprised of four sections which amended the Subversive Activities Act of 1951. The first section requires every appointing or employing official of the State or political subdivision thereof to "require every employee . . . to state under oath whether he or she is a member of the Communist Party or other subversive organization and refusal to answer *on any grounds* shall be cause for immediate termination of such employee's employment." The fourth section provides as follows:

> "The communist party is a subversive organization within the purview of R.C.W. 9.81 [The Sub-

*Because the incumbents in their various offices have changed from time to time during the course of this litigation, the names of the respondents have been changed by stipulation and order to accord with the facts.

versive Activities Control Act of 1951] and membership in the Communist Party is a subversive activity thereunder."

The federal questions sought to be reviewed here were first raised in the Complaint (Tr. 5) and the federal and state constitutional issues were the only matters in controversy at all stages of the proceeding in the trial court and the State Supreme Court. There were no factual controversies in this action. The trial court found that Section 4 of Chapter 377 violated the State Constitution in that it embraced a subject not set forth in the title to Chapter 377, that Section 3 of the Chapter, which declared "subversive" all organizations on the U.S. Attorney General's list of subversive organizations, was an unconstitutional delegation of legislative authority. That court held that Sections 1 and 2 were inseparable from Sections 3 and 4 and that therefore all of Chapter 377 was unconstitutional and void (Tr. 33). An injunction was issued restraining the enforcement of the provisions of this chapter (Tr. 34). From this injunction the respondents appealed to the State Supreme Court (Tr. 35). That court after briefs and argument, held that Section 3 was unconstitutional but upheld the constitutionality and separability of Sections 1, 2 and 4 (Tr. 47). Due to a temporary and later a permanent injunction, issued by the trial court, respondents have made no efforts to enforce the provisions of this chapter with reference to appellants. This final injunction is still in force pending this appeal (Tr. 82-83).

THE QUESTIONS ARE SUBSTANTIAL

A. The First Question Presented Is Substantial

1. *Does the oath requirement violate the Fourteenth Amendment in that it requires automatic discharge of the State employee without hearing at which he can explain or defend (a) the reason, nature or basis of his membership in the Communist Party or other subversive organization; or (b) the reason or basis of his failure or refusal to take such oath?*

Section 1 of Chapter 377 provides that refusal "on any grounds" to sign the oath shall be cause for immediate dismissal. R.C.W. 9.81.060 provides that no subversive person as defined in the Act, shall be eligible for employment by the State or political subdivision. This, in connection with Section 4 of Chapter 377, means that no matter what reason an employee has for belonging to the Communist Party, or other subversive organization, nor what is the nature or the purpose of his association therewith nor why he is unable or unwilling to execute the oath, he is subject to immediate discharge without an opportunity to be heard or explain.

This constitutes arbitrary action punitive in nature and as such constitutes a denial of due process within the meaning of the Fourteenth Amendment. *Slochower v. Board of Education of N.Y.*, 350 U.S. 551, 76 S. Ct. 637, 100 L. ed. 692 (1955). For it cannot be asserted that every knowing membership in a subversive organization is necessarily a hostile or unlawful act rendering the member unfit for state employment, or subject to punitive action. It must be borne in mind that

the oath requirement is not directed at subversive activities, but at mere membership in a subversive organization. Cf *Bridges v. Wixon*, 326 U.S. 135, 89 L. ed. 2103 (1945).

The court below seeks to justify this as a part of the selective process necessary to employment and relies on *Lerner v. Casey*, 357 U.S. 468, 78 S. Ct. 1311, 2 L. ed. (2d) 1423 (1958), *Beilan v. Board of Education*, 357 U.S. 399, 78 S. Ct. 1317, 2 L. ed. (2d) 1414 (1958), *Adler v. Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. ed. 517 (1952) and *Garner v. Board of Public Works*, 341 U.S. 716, 71 S Ct. 909, 95 L. ed. 1317 (1951) to support this proposition. However, each of these cases involved *hearings* to determine fitness of the employee for employment, at which hearing the employee could appear and be heard. This factor was considered as distinguishing, by this Court in the *Slochower case, supra*, in which it was held that the automatic and summary dismissal of the appellant without an opportunity for explanation constituted a denial of due process of law. It is significant that the opinion of the court below in the case at bar, failed to discuss, distinguish or even to refer to this Court's holdings in the following cases although these cases were cited to the Court and discussed extensively by the appellants herein in thier brief: *Slochower v. Board of Education, supra; Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.ed.(2d) 810 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.ed.(2d) 796 (1957); and

Sweezy v. New Hampshire, 354 U.S. 234, 77 S. Ct. 1203, 1 L.ed.(2d) 1311 (1957).

In the case at bar, as in *Slochower*, dismissal is automatic and immediate without a semblance of due process.

B. The Second and Third Questions Are Substantial

2. *Does such oath requirement violate the 14th Amendment in that it legislatively penalizes a State employee without notice, charges or hearing?*

3. *Does such oath requirement violate Section 10, Article I, of the Constitution in that it constitutes a Bill of Attainder?*

The oath under consideration is not an oath of allegiance, it is not a pledge of adherence to the Constitution of the United States. This is a test oath, an expurgatory oath required by the statute. It punishes legislatively without any adjudicatory process. As Mr. Justice Field stated in *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356 (1866):

> "We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty and property as comprehending every right known to the law. . . . *The deprivation of any rights civil or political, previously enjoyed, may be punishment.*" 4. Wall. 320. (Emphasis supplied)

While this oath has no retrospective or ex post facto

implications, it is a legislative punishment without judicial trial or resort. As such it is either a bill of attainder (*U.S. v. Lovett*, 328 U.S. 303, 66 S. Ct. 1073, 90 L. ed. 1252 (1946)) or a legislative punishment without trial by duly constituted courts. It cannot be justified as a step in employment selection as is suggested by court below, since no opportunity of explanation is afforded the employee to show his fitness despite membership. The statute punishes membership without regard to whether the membership has a justification or mitigating circumstances.

Even if it be conceded that a person's membership in the Communist Party is a hostile act that should be punished, to punish a member automatically without judicial trial constitutes a bill of attainder and a legislative usurpation.

C. The Fourth and Fifth Questions Present Substantial Problems

4. *Does such oath requirement violate the 14th Amendment in that it conclusively presumes that membership in the Communist Party is by itself grounds for dismissal of a State employee?*

5. *Does such oath requirement violate the 14th Amendment in that it penalizes membership in the Communist Party rather than acts constituting a substantive evil?*

In *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 1 L. ed. (2d) 810, this court held that an applicant's refusal to answer questions concerning affiliation with the Communist Party without any-

thing more is not a ground for denying him admission to the bar. The court stated that such membership alone is not an adequate basis for concluding that the member is disloyal or a person of bad character. Similarly in the case at bar the thing which the statute proscribes and punishes is not disloyalty or subversive activities but mere membership. The statute provides that a member of the Communist Party or another subversive organization is conclusively unfit and ineligible to hold public employment. Granted that most members of subversive organizations are disloyal and hence unfit, this statute would have it that every member no matter what the basis or reason for his membership, is disloyal and unfit, and to be summarily discharged. The Act is directed at the clothing of the traitor rather than his traitorous activities. It is thus an indiscriminate and unreasonable classification upon which to deny public employment. See also *Wieman v. Updegraff, supra.* It must fall as an assertion of arbitrary power offending due process.

D. The Sixth Question Presents a Substantial Problem

6. *Does such oath requirement violate the 14th Amendment to the Constitution in that it penalizes a State employee for membership in the Communist Party even in absence of his knowledge that the Communist Party has for its purpose the violent overthrow of the government?*

Prior to 1955 the Subversive Activities Act specifically required knowledge of the revolutionary purposes of an organization, before one could be found to be a subversive person through membership R.C.W. 9.81.

010(5). Section 4 of the 1955 Act specifically eliminated scienter (*i.e.*, knowledge of the revolutionary nature of the organization as distinguished from knowledge of his membership in the organization) from the definition of a subversive person *vis a vis* membership in the Communist Party. Even though the court below states that it finds that the element of scienter "is implied in every clause [of the oath] and of the pertinent statutory provisions," that court appears to hold that since it is "common knowledge" that the Communist Party is a subversive organization (Tr. 67), specific knowledge of the Communist Party's purposes on activities is universal and therefore to be implied conclusively. It is submitted that this holding is contrary to the specific holding of this Court in *Wieman v. Updegraff, supra.*

E. The Seventh Question Presents a Substantial Problem

7. Does such oath requirement violate the 1st and 14th Amendments in that it abridges freedom of speech, freedom of association and assembly?

As was stated by Mr. Justice Jackson in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. ed. 1628, sustaining the religious convictions of school children against saluting the flag.

> "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." 319 U.S. 642.

The freedoms protected by the First Amendment to the Constitution can be limited or abridged only to correct substantial evils with which the legislature has power to deal. *Adler v. Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. ed. 517; *Lawson v. Housing Authority of the City of Milwaukee*, 270 Wis. 269, 70 N.W. (2d) 605; *Danskin v. San Diego Unified School District*, 28 Cal. (2d) 536, 171 P. (2d) 885.

As applied to educators, as in the case at bar, the need for freedom of expression and association is a fundamental requisite, since freedom of inquiry, advocacy and association is probably more essential to the growth and spread of academic knowledge than to any other area of human activity. See concurring opinion of Mr. Justice Frankfurter in *Wieman v. Updegraff*, *supra*. The need for protecting college students from subversive propaganda must be viewed in relation to legislative steps taken to afford such protection. Here no effort is made to inquire into the professor's loyalty, merely his associations. While his associations may have a bearing on his loyalty, standing alone without more they are not decisive. Here, as in the *Danskin* case, *supra*, there is no escaping the conclusion that the Legislature denies employment to members of subversive organizations not because it believes that their employment would create a clear and present danger to the community, but because it believes the privilege of public employment should be denied to those whose convictions and affiliations it does not tolerate. "What it does not tolerate it seeks to censor." It is submitted that this is an un-

warranted abridgement of freedom of association and assembly.

CONCLUSION

Appellants submit that the disregard of Federal constitutional rights by the Legislature of the State of Washington and by the Supreme Court of Washington is clear and that this appeal presents substantial questions requiring consideration by this Court.

Respectfully submitted,

SOLIE M. RINGOLD
1201 Dexter Horton Building,
Seattle 4, Washington.

FRANCIS HOAGUE
320 Alaska Building,
Seattle 4, Washington.
Attorneys for Appellants

APPENDIX A

DECISION OF THE WASHINGTON STATE SUPREME COURT

[153 Washington Decisions 431]

[No. 34451. *En Banc.* January 29, 1959.]

HOWARD L. NOSTRAND *et al.*, *Respondents*, *v.* THOMAS BALMER *et al.*, *Appellants*.

Appeal from a judgment of the superior court for Thurston county, No. 28814, Wright, J., entered April 29, 1957, upon findings in favor of the plaintiffs, in an action for a declaratory judgment and for injunctive relief. Reversed.

The Attorney General and Michael R. Alfieri, Assistant, for appellants.

Solie M. Ringold and *Francis Hoague*, for respondents.

DONWORTH, J.—This action was commenced by two professors (respondents), employed by the state of Washington to teach at the University of Washington for the purpose of obtaining a declaratory judgment[2] adjudicating Laws of 1955, chapter 377, p. 1545,[3] to be violative of several provisions of the constitutions of the United States and of this state, and seeking a permanent injunction enjoining the enforcement thereof.

[2] Pursuant to the provisions of RCW 7.24.010, *et seq.*

[3] This act consists of four sections, the first two of which are amendatory of provisions initially enacted in the subversive activities act, Laws of 1951, chapter 254, p. 793, and the last two of which are entirely new legislation.

In their complaint, respondents alleged their employment under contract as professors of the University of Washington; that appellants (the university board of regents, president, and vice-president, and the state attorney general) are charged with "the duty of establishing, enforcing, carrying out and administering the provisions of . . . the Act"; that appellants have demanded that respondents sign and swear to an oath; that, unless respondents comply with such demands, their employment contracts with the university will be terminated by appellants; that, unless appellants be restrained from enforcing the act and insisting upon the execution of the oath, respondents will suffer irreparable injury not compensable in monetary damages; and that respondents have no adequate remedy at law.

In so far as is presently material, the affidavit which appellants demanded that respondents subscribe, upon oath, recites above the jurat and place provided for signature:

"(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence;

"That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955, with full knowledge that the same is subject to the penalties of perjury."

Prior to trial, respondents requested, in writing, and obtained certain admissions of fact. Other facts which respondents requested appellants to admit were denied. The record before us does not reveal what disposition, if any, the trial judge made of these disputed factual matters.

Trial to the court resulted in the entry of findings of fact (substantially in accord with the averments contained in the complaint), conclusions of law, and a final decree holding the entire act of 1955 to be violative of the constitution of this state, and permanently restraining appellants from administering and enforcing any of the provisions therein contained.[4] This appeal followed.

Before considering the respective contentions advanced by the parties, and because chapter 377, Laws of 1955, is amendatory legislation, it is necessary, in order to place it in its proper perspective, to analyze the act amended thereby, *i.e.*, the subversive activities act of 1951,[5] and to consider its background and legislative history.

The 1951 act was a comprehensive statute enacted by the legislature pursuant to executive request and

[4] The material portions of the final decree read as follows:

"It Is Hereby Ordered, Adjudged and Decreed that Chapter 377, Laws of 1955 violates the Constitution of the State of Washington, and is therefore void and of no effect; and

"It Is Further Ordered, Adjudged and Decreed that the above-named defendants [appellants] be and they are hereby permanently restrained from establishing, enforcing, carrying out, and administering the provisions of Chapter 377, Laws of 1955 and from requiring the plaintiffs [respondents] to execute any oath pursuant to said Chapter."

[5] Chapter 254, Laws of 1951, p. 793.

as a result of the report of the joint fact-finding committee on un-American activities in the state of Washington (otherwise referred to as the Canwell committee). This committee was created by house concurrent resolution No. 10,[6] adopted by the legislature at its 1947 session, and was directed to investigate subversive activities in the State of Washington and to file a report with the thirty-first (1949) legislature.

Acting pursuant to authority vested in it by this resolution, the committee conducted its investigation and held extensive public hearings in 1948.[7] As directed, the committee reported its findings, conclusions, and recommendations to the legislature at its 1949 session.[8]

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[6] Laws of 1947, p. 1378. Pertinent provisions of this resolution are quoted at length in appendix A. The complete text of house concurrent resolution No. 10 may also be found in *State ex rel. Robinson v. Fluent*, 30 Wn. (2d) 194, 191 P. (2d) 241 (1948) (cert. den., 335 U. S. 844, 93 L. Ed. 394, 69 S. Ct. 66), wherein we upheld the validity of this resolution.

[7] Other litigation resulted from these hearings, notably *State v. James*, 36 Wn. (2d) 382, 221 P. (2d) 432; 341 U. S. 911, 95 L. Ed. 1348, 71 S. Ct. 615 (cert. den.); 341 U. S. 937, 95 L. Ed. 1365, 71 S. Ct. 851 (rehearing den.). The defendant therein was charged, tried and convicted for willfully refusing to answer a proper and material question put to him by the committee after being duly summoned to give testimony. In rejecting appellant's attack upon the constitutionality of house concurrent resolution No. 10, we adhered to our prior decision in *State ex rel. Robinson v. Fluent*, *supra*. Other cases involving witnesses before the committee who were similarly charged, tried, and convicted, were consolidated on appeal to this court: *State v. Gundlach*, *State v. Forschmiedt*, *State v. Ottenheimer*, *State v. James*, 36 Wn. (2d) 918, 221 P. (2d) 502; cert. den. in *Forschmiedt* and *James* cases: 341 U. S. 910, 95 L. Ed. 1347, 71 S. Ct. 615, rehearing den. 341 U. S. 937, 95 L. Ed. 1365, 71 S. Ct. 851.

[8] House Journal of the thirty-first legislature of the state of Washington (1949), p. 1095. This report incorporated by reference two prior reports (First Report, Un-American Activities in Washington State, 1948, and Second Report, Un-American Activities in Washington State, 1948) of the committee which contained testimony adduced at its hearings, together with findings and conclusions drawn by the committee from that testimony which appears as prefatory remarks therein. Pertinent ex-

After receiving and considering the committee's report, the thirty-first (1949) legislature adopted, as part of its general appropriations act, a proviso[9] (similar to that adopted by the 1947 legislature)[10] designed to prevent public funds from reaching public employees who advocated, or who were members of organizations that advocated, the overthrow of the government of the United States by force or violence.

In his message to the thirty-second legislature at the commencement of its regular session in January, 1951, the governor pointed out the national emergency then existing, its causes and potential effects, and the strategic geographical position of the state of Washington in any such emergency.[11] He further urged that

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cerpts from the committee's final report to the legislature, including the committee's conclusions prefacing these prior reports, are set out in appendix B.

[9] Laws of 1949, chapter 242, § 2, p. 948, thereof provided, in part: ". . . That no part of any appropriation contained in this act shall be used to pay the salary or wages of any person who . . . advocates, or is a member of an organization that advocates, the overthrow of the government of the United States by force or violence. . . ."

[10] Laws of 1947, chapter 287, § 2, p. 1334.

[11] House Journal of the thirty-second legislature of the state of Washington (1951), p. 23:

"Again we meet in a time of great national emergency.

"All of us had fervently hoped for a long respite from the waste and sacrifice of war and preparation for war. Our country had placed chief reliance in the United Nations to maintain world peace and order. We had disbanded our armies, decommissioned our fleets of ships and planes, dismantled our war plants, and turned our attention to the pressing problems of our civilian economy.

"But the evil menace of expanding communism would not have it so. While the rest of the world pursued a peaceful path, the forces of communism, bent upon a wholly different course, were gathering vast strength and power. Their method was regimentation, suppression, infiltration, intimidation and aggression. Their purpose was to push the

appropriate legislation be immediately enacted in order to curb subversive activities in this state, particularly in view of the then existing national emergency and the disclosures made through the efforts of the joint fact-finding committee on un-American activities (Canwell committee) created by house concurrent resolution No. 10.[12]

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frontiers of that ideology so deeply into the territory and institutions of free nations, that all the world would fall an easy prey. Then came the day when the principles and authority of the United Nations were openly defied in the halls at Lake Success and physically challenged on the Korean fields of battle.

"This nation and the world are now awake to the danger. We still hope to avert World War III. But it is so perilously close that our nation has already come virtually to a war footing. This is bringing with it a fundamental change in our civilian economy, with resulting burdens and sacrifices for all of us. If the emergency becomes more acute, developing into a global war, we all face the risk of great loss and suffering. We face these possibilities, not cheerfully, but with the determination to do what must be done to preserve, for our children, the way of life all of us so deeply cherish.

"It is in this setting that the Thirty-second Legislature of the State of Washington meets to discharge its legislative duties.

"Our state occupies a position of great importance in this emergency, as it did throughout World War II. It is a tremendous arsenal for military might. Its strategic geographical location, moreover, has special military significance in any war with communism. . . ."

[12] *Ibid.* p. 30:

"To further strengthen our civil defense program, we also must be mindful of that small group of traitors within our citizenry who would destroy our freedom from within. In this connection I strongly urge that the legislature give thought to enactment of appropriate provisions for the curbing of subversive activity, and to protect our free institutions from perversion into weapons of aggression against us in the hands of our enemies.

"By Concurrent Resolution No. 10, the Thirtieth legislature created the Joint Legislative Fact Finding Committee on Un-American Activities. Through the labors of this committee much was learned of the degree to which disloyal groups had infiltrated into organizations of our senior citizens, into various economic and educational groups. As the result of these disclosures, some remedial action was taken but in the light of the grave emergency which we now face, additional action must be taken immediately. Therefore a bill is being prepared calculated to give support at the state level to the efforts of our various federal agencies charged with the responsibility of combating these forces of tyranny and enslavement. . . ."

The subversive activities act originally passed by the legislature in 1951 consisted of twenty-two sections. Five of these, (§§ 6, 7, 8, 10, and 21), containing administrative provisions, were vetoed by the governor.[13] The remaining seventeen sections became effective on March 19, 1951, upon executive approval.[14] Each of these sections falls into one of three general classifications: penal, administrative, or regulatory.

Sections eleven, twelve, thirteen, fourteen and seventeen bear directly upon the problem before us and are set out in the margin.[15] These sections impose conditions upon eligibility for public employment in sensitive occupations and require that all such state em-

[13] Laws of 1951, chapter 254, §§ 6, 7, and 8, pp. 797, 798, § 10 p. 798, § 21, p. 802. Senate Journal of the thirty-second legislature of the state of Washington, p. 842.

[14] Laws of 1951, chapter 254, § 22, p. 803.

[15] Laws of 1951, chapter 254:

"Sec. 11. No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state. (*cf.* RCW 9.81.060)

"Sec. 12. Every *person* and every *board, commission, council, department, court or other agency* of the state of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall *establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person.* In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. (Italics ours.) (*cf.* RCW 9.81.070)

"Sec. 13. The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to

ployees, or applicants for state employment, take an oath, subject to the penalties of perjury, as a prerequisite of public employment or the continuance thereof.

The terms "subversive person," "subversive organi-

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be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof. (*cf.* RCW 9.81.030)

"Sec. 14. Every person who, on June 1, 1951, shall be in the employ of the state of Washington or of any political subdivision thereof, other than those now holding elective office shall be required on or before July 1, 1951, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this act; namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this act. Such statements shall be prepared and execution required of and by every person and every board, commission, council, code department, court or other agency of the state of Washington or any subdivision thereof responsible for the supervision of other employees, for the employees under the jurisdiction thereof. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this act shall immediately be discharged. . . .

"Sec. 17. Every written statement made pursuant to this act by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who wilfully makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this act, or (c) under oath in any hearing conducted by any agency of the state, or of any of its political subdivisions pursuant to this act, or (d) in any written statement by an applicant for appointment or employment or by an employee in any state aid or private institution of learning in this state, intended to determine whether or not such applicant or employee is a subversive person as defined in this act, which statement contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury, as prescribed in chapter 9.72, R.C.W." (*cf.* RCW 9.81.110.)

zation," and "foreign subversive organization" (used in these five sections) are particularly defined in section one of the act. The definition of "subversive person" was amended in 1953[16] to specifically provide that a person must have knowledge that an organization is a "subversive organization" or "foreign subversive organization" (as elsewhere defined in section one) before such person becoming or remaining a member thereof can be deemed to be a "subversive person." (This 1953 amendment is a complete answer to respondents' argument in their brief concerning the alleged lack of *scienter* as an essential element in this section.) *Cf. Wieman v. Updegraff*, 344 U.S. 183, 97 L. Ed. 216, 73 S. Ct. 215 (1952).

With this legislative history and background in mind, we now turn to the consideration of Laws of 1955, chapter 377, which was held by the trial court to be unconstitutional in its entirety. As previously stated, this act consists of only four sections, of which the first two purport to amend sections twelve and thirteen of the 1951 act (RCW 9.81.070 and .080), and the latter two purport to add new sections thereto (*cf.* RCW 9.81.082 and .083). These latter two sections will be considered in the order ruled upon by the trial court and discussed by the respective parties in their briefs.

Section three of the amendatory act provides:

"For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the

[16] Laws of 1953, chapter 142, p. 273.

United States as being subversive pursuant to executive order No. 9835."

The trial court concluded that:

"Section 3 of chapter 377, Laws of 1955, constitutes an unconstitutional delegation of legislative authority to an officer of the United States over which the state government has no control and without adequate standards being set forth to guide such officer in the exercise of such delegation."

[1] Appellants first assign error to this conclusion. They argue that section three was merely an adoption by our legislature of a factual determination made by a foreign administrative agency (U.S. attorney general). This argument is unappealing for at least three reasons:

(1) Executive order No. 9835, promulgated by the president of the United States on March 21, 1947 (5 U.S.C.A., § 631; 12 F.R. 1935; 3 C.F.R., 1943-1948 Comp. p. 627), was specifically revoked by executive order No. 10450 (5 U.S.C.A., § 631, 18 F.R. 2489, 3 C.F.R., 1953 Supp., p. 72), issued April 27, 1953 (almost two years prior to the enactment of § 3.

(2) The method followed by the attorney general for listing subversive organizations pursuant to executive order No. 9835 was held by the supreme court of the United States to be violative of the due process clause of the fifth amendment to the United States constitution in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 95 L. Ed. 817, 71 S. Ct. 624 (April 30, 1951), which was almost four years prior to the enactment of § 3.

(3) Section three purported to include "membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive." This would include organizations listed by him *in futuro ad infinitum*. Statutes attempting to adopt by reference future Federal rules, regulations or statutes are unconsitutional. *State ex. rel. Kirschner v. Urquhart*, 50 Wn. (2d) 131, 310 P. (2d) 261 (1957).

Thus it is apparent that section three purported to adopt unconstitutional findings of the attorney general, promulgated pursuant to an executive order, which had been revoked and superseded long prior to the enactment of the 1955 act. We cannot, under the guise of judicial interpretation, interject executive order No. 10450 (and the due process procedure provided for the listing of subversive organizations thereunder) into section three, contrary to the express terms thereof. This section is, therefore, unconstitutional and void. *State ex rel. Kirschner v. Urquhart, supra*. For these reasons, the result reached by the trial court is correct, and appellants' first assignment of error cannot be sustained.

Appellants next assign error to the trial court's conclusion that:

"Section 4 of chapter 377, Laws of 1955, amends § 1, chapter 254, Laws of 1951, in that it adds a new category of subversive organization and of subversive activity. This section, therefore, embraces subjects not set forth in the title to chapter 377, Laws of 1955, and is, therefore, unconstitutional."

(It must be noted that the court's reference in this conclusion to "§ 1, chapter 254, Laws of 1951" is inaccurate, in that it overlooks the fact that section one was previously amended by Laws of 1953, chapter 142, § 1, p. 273.)

Section four of the 1955 act provides:

"The communist party is a subversive organization within the purview of RCW 9.81 and membership in the communist party is a subversive activity thereunder."

Apparently, the above quoted conclusion of the trial court is based on Art. II, § 19, of the Washington constitution, requiring that:

"No bill shall embrace more than one subject, and that shall be expressed in the title."

If section four is in fact *amendatory* of a prior section of the subversive activities act, as the trial court concluded, it would also violate Art. II, § 37 of the Washington constitution, which provides:

"No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."

[2] Respondents' argument is that section four amends the definition of "subversive organization" (Laws of 1953, chapter 142, § 1; RCW 9.81.010) by establishing conclusively that the communist party is such an organization, thereby creating a "new and different crime" under Laws of 1951, chapter 254, § 3 (RCW 9.81.030). This contention is untenable.

Section four of the 1955 act is nothing more than the

legislature's declaration of its recognition that the communist party falls within the definition of "subversive organization" contained in Laws of 1953, chapter 142, § 1. As such, it is supplementary rather than *amendatory*. Therefore, the sections of the act which it supplements need not be set out in full in order to satisfy the last mentioned constitutional requirement, because:

". . . If the amendatory act only adds a new section to the old act, only the new section need be set forth in the body of the amendatory act." 1 Sutherland, Statutory Construction (3d ed.), 407, § 1928.

See, also, *State v. Lawson*, 40 Wash. 455, 82 Pac. 750 (1905); *State ex rel. Washington Toll Bridge Authority v. Yelle*, 32 Wn.(2d) 13, 200 P.(2d) 467 (1948); *Bellingham v. Hite*, 37 Wn.(2d) 652, 225 P.(2d) 895 (1950).

[3] Laws of 1955, chapter 377, is entitled:

"An Act relating to subversive activities; requiring state, county and municipal employers to ask employees under oath concerning memberships in *the communist party or other subversive groups;* and amending . . ." (Italics ours.)

The single subject of the entire act, "subversive activities," is "expressed in the title" as required by Art. II, § 19, of the state constitution. That part of the title above italicized characterized the communist party as a "subversive group" and gives sufficient notice of the contents of section four.

We are of the opinion that the title of the 1955 act does not violate either of the constitutional provisions above discussed and that the trial court's conclusion, holding to the contrary, is erroneous.

Error is next assigned to the trial court's conclusion that:

"Chapter 377, Laws of 1955, is unconstitutional in its entirety . . . because . . . §§ 3 and 4 of the chapter are not separable from the first two sections."

[4] In *In re Hendrickson*, 12 Wn.(2d) 600, 123 P.(2d) 322 (1942), we recognized that the ultimate test of separability is the intention of the legislature, as determined by the court, and restated the rule to be:

". . . that the entire statute will fall where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning, and purpose that it cannot be believed that the legislature would have passed the one without the other, or where the portion eliminated is so intimately connected with the rest of the statute as to make it useless to accomplish any of the purposes of the legislature. [Citations.]"

[5] Applying these principles to the 1955 act, we find that when sections one and two thereof are substituted for sections twelve and thirteen of the act of 1951, which they amend, the legislature has stated its intention in section eighteen of the original act that these sections be considered separable. While such a saving clause is not conclusive, it does give us assurance that the legislature would have passed the act even though it knew that section three were to be eliminated. See *State ex rel. King County v. State Tax Comm.*, 174 Wash. 336, 24 P.(2d) 1094 (1933). But apart from this, our analysis of the purpose of the several sections of the 1955 act clearly manifests the intention of the legisla-

ture that these sections be separable and are capable of functioning independently of each other.

[6] Sections one, two, and four of the 1955 act relate to subversive activities generally, and to the communist party particularly. Section three, however, pertains to subversive activities generally and, in particular, is nothing more than an abortive attempt on the part of the legislature to designate by reference about 250 other organizations as subversive within the definition contained in section one of the 1951 act, as amended by Laws of 1953, chapter 142, §1 (*cf.* RCW 9.81.010). By designating the communist party as a subversive organization in section four, the legislature supplied the reason why it required in section one, as a condition of public employment, that every present and prospective public employee state, under oath, whether he or she was then a member of the communist party, except in nonsensitive occupations, as provided in section two. Obviously, sections one and four were designed to prevent any claim (which the legislature found to be entirely unfounded in fact) that the communist party was not, and is not, a "subversive organization" as defined in the 1951 act, as amended.

It is thus apparent that the invalidity of section three does not vitiate the remainder of the 1955 act. Absent section three, the entire subversive activities act (including the amendments made by section one, two, and four of the 1955 act) can be administered in precisely the same manner as with section three, with the single exception that no list of alleged subversive organizations prepared by the United States attorney

general may be used to designate membership in proscribed organizations. Since section three of the 1955 act is clearly separable and a workable statute remains after its severance, we cannot sustain the above quoted conclusion of the trial court.

[7] Respondents further argue that "the state has no power to enact a subversive activities control statute." They cite *Pennsylvania v. Nelson*, 350 U.S. 497, 100 L.Ed. 640, 76 S.Ct. 477 (1956), wherein the defendant was charged and convicted in the Pennsylvania *state* court with an attempt to overthrow the government of the *United States* by force and violence contrary to the Pennsylvania sedition act of 1949. The United States supreme court (affirming the decision of the supreme court of Pennsylvania) there held that certain *Federal* legislation had pre-empted the field of sedition against the *United States*.[17] As we understand that case, the court did not hold, either expressly or by implication, that a sovereign state was precluded from enacting laws designed to suppress acts of sedition against the state itself. Moreover, the *Nelson* case had no relation whatever to, and did not involve, the power of a state to enact state laws and regulations prescribing qualifications prerequisite to public employment. But even if we assume, *arguendo*, that Federal legislation has pre-empted the field of sedition against both *Federal and state* governments, still that which has just been said above concerning separability of the 1955 act applies with equal force to the separability of the penal sections

[17] See *State v. Diez* (Fla.) 97 So. (2d) 105 (1957) for a comprehensive discussion of the inapplicability of the *Nelson* case to state statutes prescribing conditions precedent to public employment.

(§§ 2 and 3) of the 1951 act from those sections (§§ 1 and 2 of the 1955 act) prescribing qualifications for public employment.

Respondents complain that the statute[18] which requires them to execute the oath in question is a bill of attainder and, as such, contravenes Art. I, § 23, of the state constitution and Art. I, § 10, of the United States constitution.[19] Their argument is substantially the same as that rejected by this court in *Huntamer v. Coe*, 40 Wn. (2d) 767, 246 P. (2d) 489 (1952), wherein we held that section 16, as implemented by section 1(e), of the act of 1951 (requiring a similar oath as a condition precedent to filing a declaration of candidacy for any public office) was not unconstitutional for these reasons.

[8] Section twelve of the 1951 act, as amended by Laws of 1955, chapter 377, § 1, requires only that every present or prospective public employee state, under oath, whether he or she is "a member of the communist party or other subversive organization" at the time the oath is taken. No punishment for past conduct or political activity is involved. Only one qualification precedent to public employment is imposed. In short, this section is clearly neither *ex post facto* nor in the nature of a bill of attainder. *Huntamer v. Coe, supra*; *Garner v. Board of Public Works of Los Angeles*, 341

[18] Laws of 1951, chapter 254, § 12, as amended by Laws of 1955, chapter 377, § 1.

[19] "No bill of attainder, ex post facto law . . . shall ever be passed." Art. I, § 23, of the Washington constitution.
"No state shall . . . pass any bill of attainder, ex post facto law, . . . " Art. I, § 10, of the United States constitution.

U. S. 716, 95 L. Ed. 1317, 71 S. Ct. 909 (1951); *American Communications Ass'n v. Douds*, 339 U. S. 382, 413, 94 L. Ed. 925, 70 S. Ct. 674 (1949); *Pickus v. Board of Education of Chicago*, 9 Ill. (2d) 599, 138 N. E. (2d) 532 (1956).

[9] Nor do we find merit in respondents' assertion that section twelve, as amended, violates Art. I, § 9, of the Washington constitution[20] or that clause of the fifth amendment to the United States constitution which provides that no person "shall be compelled in any criminal case to be a witness against himself." Respondents are not compelled by section twelve to do anything. But, if they desire to remain in public employment, they must comply with the standards of eligibilty established by the legislature, and their refusal to do so renders them ineligible for further employment.

Respondents also attack the oath requirement of the act, contending that it abridges their rights of freedom of speech and assembly protected by Art. I, §§ 4 and 5, of the Washington constitution,[21] and the first and fourteenth amendments to the United States Constitution.[22]

[20] "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." Art. I, § 9, of the Washington constitution.

[21] "The right of petition and of the people peacefully to assemble for the common good shall never be abridged." § 4.

"Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." § 5.

[22] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Art. I.

Pickus v. Board of Education of Chicago, supra, was an action for a declaratory judgment and an injunction holding unconstitutional, and restraining the enforcement of, that section of the Illinois finance act of 1955 which required all public employees to execute a "non-communist affidavit" as a condition precedent to receiving compensation for their services from the state or its political subdivisions. In the course of its opinion, holding the section involved to be constitutional, the Illinois supreme court, speaking through Chief Justice Klingbiel, said:

"Plaintiffs assert that section 30b is an unwarranted denial of the right to speak. They fail to point out, however, the respect or way in which they consider such right to be involved here. The statute simply provides for the execution of an affidavit of fact. It does not purport to limit or restrict the right of employees to speak or assemble."

And, in *Albert Appeal*, 372 Pa. 13, 92 A. (2d) 663 (1952), a teacher in the Pittsburgh public school system was dismissed and her contract terminated by the board of education after a hearing on charges preferred by the superintendent of schools of Pittsburgh that she was a communist, and for "advocation of or participating in un-American or subversive doctrines." In affirming the decision dismissing the teacher's appeal, the court said:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Art. XIV, § 1.

"There is no question of the right of free speech involved in this case. Miss Albert is not being penalized in her capacity *as a private citizen* because of any political, economic or social views she may entertain or any expression she may care to give to those views. The concern here is with her rights as a *teacher*, and the legislature can certainly prescribe qualifications for teachers in the public schools with respect not only to their academic attainments but also to their moral characters and their loyalty to the state and federal governments. Judge (later Mr. Justice) Holmes, in a characteristically epigrammatic phrase, said in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517: 'The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.' To the same effect, Mr. Justice Minton, speaking for the United States Supreme Court, said in *Adler v. Board of Education of the City of New York*, 342 U. S. 485, 492 [96 L. Ed. 517, 524, 27 A. L. R. (2d) 472, 476 (1952)]: 'It is clear that such persons [employed or seeking employment in the public schools] have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the State in the school system on their own terms. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.'"

After stating the matter just quoted, the United States supreme court, in the *Adler* case, went on to say:

"If, under the procedure set up in the New York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed [subversive] organization, he is

not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence."

In *Fitzgerald v. Philadelphia*, 376 Pa. 379, 102 A. (2d) 887 (1954), a nurse, who had been dismissed from her employment in the Philadelphia General Hospital for declining to take the oath required by section five of the Pennsylvania loyalty act of 1951,[23] sought reinstatement. In affirming a judgment adverse to her, the supreme court of Pennsylvania said:

"We do not understand that appellant argues — or indeed could argue — that the Commonwealth or any of its political subdivisions cannot refuse employment, or discontinue it, in the case of anyone who is knowingly a member of a subversive organization. It would be intolerable for any government to retain in its employ one who advocates its overthrow by force or violence or knowingly consorts with others in an organization having such an objective. What we held in *Albert Appeal*, 372 Pa. 13, 92 A. (2d) 663, and what the Supreme Court of the United States held in *Adler v. Board of Education of the City of New York*, 342 U. S. 485, in regard to teachers applies equally to all public employees, namely, that the legislature, as a condition of their employment, may prescribe qualifications with respect not only to their general attainments but also

[23] It is significant to note that the statute there involved is strikingly similar to section twelve of the subversive activities act which is involved in this case.

to their moral character and their loyalty to the state and federal government, and, to that end, may deny them public employment if they are knowingly members of a disloyal and seditious organization. . . . That being so, the oath prescribed by the 1951 Act is obviously justified for the purpose of informing the appointing authority as to whether the employee is in fact a member of an organization which he knows is subversive in character and therefore is not a fit person to be entrusted with the duty of supporting and advancing the interests of the very government whose destruction he is seeking to accomplish."

Shortly after this case was argued in this court, the supreme court of the United States rendered its decisions in *Beilan v. Board of Education*, 357 U. S. 399, 2 L. Ed. (2d) 1414, 78 S. Ct. 1317 (1958), and *Lerner v. Casey*, 357 U. S. 468, 2 L. Ed. (2d) 1423, 78 S. Ct. 1311 (1958). In the former, a teacher was discharged by the board of education on its finding of "incompetency" because of his refusal to answer questions relating to his past communistic affiliations and activities. In upholding the decision of the Pennsylvania supreme court, sustaining the board's action, the United States supreme court carefully pointed out that the teacher was discharged not for disloyalty, but for "incompetency," and that such discharge did not violate the due process clause of the fourteenth amendment.

In the *Lerner* case, the court upheld a judgment of the New York court of appeals, which had the effect of sustaining the dismissal of a subway conductor, employed by the New York City Transit Authority, who, when asked (by the commissioner of investigation of

New York City) whether he was *then* a member of the communist party, refused to answer, claiming his privilege against self-incrimination under the fifth amendment. He was subsequently suspended, and later discharged. A finding "that, upon all the evidence, reasonable grounds exist for belief that, because of his doubtful trust and reliability . . . [his] continued employment would endanger national and state security," was based on his refusal to answer the question asked. The supreme court accepted the reasoning of the court of appeals that the city employee had been discharged neither

" . . . because of any inference of Communist Party membership which was drawn from the exercise of the Fifth Amendment privilege [which, the court pointed out, was not available to appellant through the fourteenth amendment in this city investigation], nor because of the assertion of that constitutional protection, but rather because of the doubt created as to his 'reliability' by his refusal to answer a relevant question put by his employer, . . . "

Like the *Lerner* case, *supra*, the question which section twelve of our 1951 act, as amended in 1955, requires respondents to answer is whether or not they *are* members of the *communist party*, or other subversive organization.

That the communist party was, in fact, a subversive organization, as defined in the 1951 act, at the time that our legislature designated it as such (by § 4 of the 1955 act) can scarcely be doubted. (See appendix C.)

[10] Even prior to the commencement of hostilities

in Korea in 1950, numerous judges had recognized the communist party as a part of a world conspiracy having as its prime objective the overthrow of the United States government by force and violence, or whatever means possible, constitutional or otherwise.[24] Since then, Congress, in 1950, enacted legislation designed to control the communist party,[25] and, in 1954, proscribed it.[26] The courts of New Jersey[27] and Pennsylvania[28] take judicial notice of the fact. We can, and do now, hold likewise, because the fact that the communist party is a subversive organization is now a matter of common knowledge.

[11] It is settled law that the state may inquire of its employees regarding matters that may prove relevant to their fitness and suitability for public service. *Adler v. Board of Education, supra; Garner v. Los Angeles Board of Public Work, supra.* Particularly is this true with respect to the employment of teachers in its public schools and institutions of higher learning. The reasons compelling this conclusion are

[24] E.g., Concurring opinion of Mr. Justice Jackson in *American Communications Ass'n v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 674; dissenting opinion of Mr. Chief Justice Stone in *Schneiderman v. United States*, 320 U. S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 (1942); dissenting opinions in *State ex rel. Huff v. Reeves*, 5 Wn. (2d) 637, 106 P. (2d) 749, 130 A. L. R. 1465 (1940).

[25] Title I (the subversive activities control act of 1950) of the internal security act of 1950, (the McCarran act) of September 23, 1950, 64 Stat. 987, 50 U. S. C. A., § 781, *et seq.*

[26] Communist control act of 1954 of August 24, 1954, 68 Stat. 775; 50 U. S. C. A., § 841, *et seq.*

[27] *Laba v. Newark Board of Education*, 23 N. J. 364, 129 A. (2d) 273 (1957).

[28] *Albert Appeal*, 372 Pa. 13, 92 A. (2d) 663 (1952).

aptly pointed out by the New Jersey supreme court in *Laba v. Newark Board of Education*, 23 N. J. 364, 129 A. (2d) 273 (1957), which quoted with approval from *Thorp v. Board of Trustees of Schools for Industrial Education*, 6 N. J. 498, 79 A. (2d) 462 (1951), judgment vacated as moot, 342 U. S. 803, 96 L. Ed. 608, 72 S. Ct. 35 (1951), as follows:

"The maintenance of the purity of the educational process against corruption by subversive influences is of the highest concern to society. It is in no real sense a denial of academic freedom to require of a teacher, as a condition to employment, a sworn disavowal of allegiance to the doctrine of force or violence as a mode of overthrowing government. That would seem to be axiomatic. Loyalty to government and its free democratic institutions is a first requisite for the exercise of the teaching function. Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualifications. The apprehended danger is real and abiding. We have long had evidences of the pressure here of a godless ideology ruthlessly fostered by a foreign power which has for its aim the violent overthrow of government and free society. And one of its weapons is the debasement of teaching as a softening measure in the consummation of the subversive process. The school system affords the opportunity and means for subtle infiltration. *There is no intrusion upon personal freedoms when government intervenes, as it has here, to avert this peril to its very existence. A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching.* The teacher is not obliged to take the oath; but if he refuses to do so he is not entitled to teach. In the current

struggle for men's minds, the State is well within its province in ensuring the integrity of the educational process against those who would pervert it to subversive ends." (Italics ours.)

In *Adler v. Board of Education, supra,* the supreme court said:

" . . . A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. *In this, the state has a vital concern.* It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." (Italics ours.)

In this case, because of their positions in a "sensitive" area, each respondent is required, by section twelve of the 1951 act, as amended in 1955, to state, upon oath, whether he is a member of the communist party or other subversive organization.

[12] The foregoing authorities clearly hold that, without violating any of the constitutional rights here invoked by respondents, the state is entitled to ask this

question and to demand an answer as a condition of continued employment. Refusal to answer is sufficient grounds for discharge, whether it be for "incompetency" (*Beilan v. Board of Education, supra*), or because by his lack of candor he provides evidence of his "doubtful trust and reliability." (*Lerner v. Casey, supra.*)

[13] Respondents also contend that the form of oath which appellants demanded that they sign violates the due process clause of the fourteenth amendment[29] to the United States constitution, and Art. I, §§ 3 and 12,[30] of the state constitution, in failing to include the element of *scienter* of the subversive character of a subversive organization on the part of the prospective affiant. As we interpret the form of oath, we find that this element is implied in every clause thereof and of the pertinent statutory provisions. See *Garner v. Board of Public Works of Los Angeles, supra.* As so construed, the case for *Wieman v. Updegraff, supra,* on which respondents rely, has no application.

Conclusion.

No authority, state or Federal, has been called to our attention (and we have discovered none from our own research) holding either:

(a) That the states have been deprived of their

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[29] See note 21, *supra.*

[30] "No person shall be deprived of life, liberty, or property without due process of law." Art. I, § 3, of the Washington constitution.

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Art. I, § 12, of the Washington constitution.

control over public schools or institutions of higher learning operated by them, including the power to protect the students therein against the possible exertion of subversive influence by their teachers or other instructors; *or*

(b) That the states have been deprived of the right to investigate the qualifications (including loyalty) of their employees who are paid by public funds.

[14] In the absence of such authority, this court must hold that all of the provisions of the Laws of 1955, chapter 377, *except* section three thereof, are a valid exercise of the sovereign power of the state for the protection of the state of Washington and its existing educational institutions, and their respective students, under the tenth amendment to the United States constitution, reading as follows:

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

We are further of the opinion that the 1955 act (except § 3) does not, in any respect contravene any of the provisions of our state constitution or of the United States constitution which have been invoked by respondents.

It follows from what has been said herein that the action of appellants in demanding that respondents sign the form of oath attached to the complaint was correct.

The decree of the trial court is reversed with directions to dissolve the permanent injunction restraining

appellants from performing their official duties under the 1955 act (except § 3) with respect to respondents and to dismiss their action.

Neither party shall be allowed costs in this court.

ALL CONCUR.

APPENDIX A

Excerpts from House Concurrent Resolution No. 10, Laws of 1947, p. 1378.

"WHEREAS, These are times of public danger, subversive persons and groups are endangering our domestic unity, so as to leave us unprepared to meet aggression, and under cover of the protection afforded by the bill of rights these persons and groups seek to destroy our liberties and our freedom by force, threats and sabotage, and to subject us to the domination of foreign powers; and

"WHEREAS, Recent announcements by responsible officers of the federal government indicate the seriousness of the problem; J. Edgar Hoover, Director of the Federal Bureau of Investigation,* recently said: 'During the past five years American Communists have made their deepest inroads upon our national life. Their propaganda, skillfully designed and adroitly executed has been projected into practically every phase of our national life. The Communist influence has projected itself into some newspapers, books, radio and the screen, some churches, schools, colleges and even fraternal orders have been penetrated, not with the approval of the rank and file, but in spite of them'; and

*In 1957, after nearly forty years' experience in dealing with communist activities in the United States, Mr. Hoover reported to the American public on this subject in "Masters of Deceit" (Library of Congress Catalog Card No. 58-7643). For a description of communist party operations in the United States, see parts II, III, and IV.

"WHEREAS, State legislation to meet the problem and to assist law enforcement officers can best be based on a thorough and impartial investigation by a competent and active legislative committee;

"*Now, Therefore, Be It Resolved*, That there is hereby created a Joint Legislative Fact-finding Committee on Un-American Activities in the State of Washington which shall investigate, ascertain, collate and appraise all facts concerning individuals, groups or organizations whose activities are such as to indicate a purpose to foment internal strife, discord and dissension; infiltrate and undermine the stability of our American institutions; confuse and mislead the people; and impede the normal progress of our state and nation either in a war time or a peace time economy; and

"*Be It Further Resolved*, That in addition to other duties imposed upon the committee, the committee shall investigate the activities of groups and organizations whose membership includes persons who are communists, or any other organization known or suspected to be dominated or controlled by a foreign power, which activities affect the conduct of this state, the functioning of any state agency, unemployment relief and other forms of public assistance; educational institutions of this state supported in whole or in part by state funds, or any political program; and

"*Be It Further Resolved*, That the committee shall consist of four members of the House of Representatives, appointed by the speaker thereof; and three members of the Senate appointed by the president thereof and they shall be subject to confirmation of their respective bodies. The speaker of the House of Representatives shall appoint the chairman of the board; and

"*Be it Further Resolved*, That the committee hereby

created . . . shall have . . . all powers necessary or convenient to accomplish the objects and purposes of this resolution, including but not limited to the following duties and powers: . . .

"(5) To hold public hearings at any place in the State of Washington at which hearings the people are to have an opportunity to present their views to the committee;

"(6) To make a complete study, survey and investigation of every phase of the subject of this resolution, including but not limited to the operation, effect, administration, enforcement, and needed revision of any and all laws in anywise bearing upon or relating to the subject of this resolution;

"(7) To meet at any and all places in this state, in public or executive session;

"(8) To act during this session of the legislature, including any recess hereof, and after final adjournment hereof until commencement of the thirty-first legislature;

"(9) To file a report with the thirty-first legislature . . ."

APPENDIX B

I.

Pertinent prefatory remarks of the Joint Fact-finding Committee on Un-American Activities in the State of Washington addressed to the Speaker of the House of Representatives and the Thirtieth Legislature, contained in the First Report, Un-American Activities in Washington State, 1948, are as follows:

"The testimony and evidence in the first hearings

prove conclusively, in the judgment of your Committee, that:

"1. Communists in the State of Washington operate under, and undeviatingly follow, policies laid down for them by the Soviet government.

"2. These policies are promulgated on a nation-wide basis and that the activities of Communists in the State of Washington are coordinated with Communist activities in the other states of the union.

"3. The dovetailed nation-wide program is designed to create distrust of their form of government in the minds and hearts of the American people; create unrest and civil strife, and impede the normal processes of state and national government, all to the end of weakening and ultimately destroying the United States as a constitutional republic and thereby facilitating the avowed Soviet purpose of substituting here a totalitarian dictatorship.

"Fantastic as this may appear to the uninitiate and the naive, the testimony produced at the public hearings clearly brings into view the extreme danger of the Soviet directed Communist conspiracy to the peace and security of the people of the State of Washington and the United States."

II.

Salient prefatory remarks of the above mentioned committee address to the Thirty-first Legislature of the State of Washington, contained in the Second Report, Un-American Activities in Washington State, 1948, are:

"The hearing, conducted by a legally appointed committee of the legislature, met with much resistance and actual sabotage in its proceedings. Under the guise of

a 'picket line' Communist inspired marchers surrounded the 146th Field Artillery Armory, scene of the hearing, and raised their voices in shouting in an obvious attempt to drown out the testimony of witnesses.

"Seattle police arrested ringleaders of the demonstrations on charges of disorderly conduct. Joint efforts of Seattle police and the State Patrol were necessary to quell the disturbances so that your Committee could carry on its hearings in an orderly manner.

"While the number of University faculty members exposed as having or having had Communist Party affiliations was relatively small compared with the actual size of the faculty, the hearing developed that the pattern of Communist infiltration was identical with that employed by the Communists in other fields.

"In virtually every field in which they ultimately have been the dominating influence the Communists start with a small but active minority who almost invariably conceal their affiliations and operate as so-called 'liberals.'

"Your Committee wishes to direct particular attention to the testimony concerning not only the University of Washington but to the proven Communist domination of the Repertory Playhouse, an off-campus school of the drama, which has drawn many of its students from the University. Testimony concerning the affiliation of the leadership of this school with Communist activities is preponderant, and, to the uninitiate, startling in the extreme."

III.

Excerpts from the Report of Un-American Activities Committee to the Thirty-first Legislature of the State of Washington (House Journal, 1949, p. 1095, *et seq.*):

". . . The State of Washington is acrawl with trained and iron disciplined Communists. They have operated here with seeming immunity. Many of them hold almost impregnable positions of confidence and trust in their communities. They have successfully infiltrated their constant objectives, education, government, labor and municipal services. They effectively operate and manipulate an incredible maze of propaganda outlets known as Communist Front Organizations.

"If the Communists are permitted to work unhampered a short time more in American education, the significance of our historic background will be almost completely lost to a generation of Americans. Our endeavors in uncovering Communist activity in education were largely confined to disclosure of evidence showing that Communists agents are being employed by this state in tax-supported institutions.

"We did not at this time investigate to any great extent the substance of any teaching. We felt it sufficient to disclose the aims of the Communists in education and point out the rigid discipline and control held by the Party over its members. It then becomes obvious that a member of the Communist Party could not possibly shed his communism on entering the classroom. That as a Communist he is dedicated to the overthrow of the system and state employing him. That as a Communist he has subordinated his belief in academic freedom to the will of the Communist Party. By his own consent he is no longer a free agent and when he talks of academic freedom and civil rights it becomes the rankest hypocrisy. . . .

"Early in our investigations it became apparent that a large and well-organized group of disciplined Communists are operating in the State of Washington and have been for many years. These Communists are agents of

Soviet Russia through their membership and strict loyalty to the Communist Party. Some are aliens, more are American born, but all are alike in their undeviating obedience to the dictates of the Kremlin laid down to them in what is known as the Party Line.

"Every Communist and Communist sympathizer is a potential saboteur and spy and it is the rankest nonsense to finance this program of self-destruction with public funds. An alarming number of Communists are on federal, state and municipal payrolls.

"The predatory nature of the world Communist Party is well attested to by many former Communists in the transcripts of our two public hearings which are appended to and made a part of this report. They are identified as 'First Report on Un-American Activities in Washington State' and 'Second Report on Un-American Activities in Washington State.'

"In addition to the printed reports of testimony taken at our two public hearings, the Committee has accumulated an index file of approximately 40,000 subjects dealing with Communists, their Front Organizations and activities and related materials. In the case of notorious Communists such as . . . . [certain persons named], their cards may have scores of individual notations and cross references. We have found a pattern of Communist intrigue and conspiracy of alarming proportions extending over the State of Washington and the Pacific Northwest like a huge spider web. The cables of this web are imbedded deep in federal, state, and municipal government, all levels in education, state welfare programs, labor organizations and religion. . . . .

"While engaged in an intensive investigation in these two fields of Communist activity, it became increasingly apparent that all Communist activity in all fields is inter-related. That Communist agents while assigned to

different projects are all dedicated to the same objective; the softening up of our people for the eventual violent overthrow of our government. That they work as a team taking their orders from the top, and that they do not deviate in the minutest detail from the Party Line and Party instructions. This may involve the following out of some minor Party assignment in a labor organization, outside speaking engagements for a university professor, or obedience to accepted Party conduct before a legislative hearing. No deviation from Party instructions is permitted—none occurs. . . ."

(For the committee's remarks concerning "Academic Freedom," particularly with reference to its investigation of subversive activities at the University of Washington, see that subheading in its report commencing on page 1110 (House Journal, 1949), and the letter of Raymond B. Allen, then president of the University of Washington, set out at length therein.)

Continuing the quote from the aforementioned report, at page 1117 of the House Journal (1949):

"J. Edgar Hoover is one of the outstanding and most vocal enemies of the Communists and has repeatedly stated that the members of the Communist Party in America are fifth column agents representing a hostile government. . . .

"In reply to a question regarding the initiation of criminal prosecutions by the FBI in cases where federal employees failed to disclose Communist Party affiliations, Mr. Hoover stated:

"'Criminal prosecutions are initiated in proper cases, but not by the FBI. That is a responsibility of the prosecuting officials of the Department of Justice and the various United States attorneys. It's not a simple

matter to prove that one is a Communist. In fact, the most dangerous Communists in the nation today are not the open, avowed, card-carrying Party members. They seek to attach themselves to liberal and progressive movements. They conceal their real Communist affiliations, because they know that once exposed they will outlaw themselves in the hearts and minds of Loyal Americans. A real Communist supporter can be identified by his acts—he follows his party line, espouses the Party's causes and often furthers its aims by his overt acts.

"'The Communist Party has long regarded infiltration of the government service as a project carrying highest priority. They have sought to accomplish this under the guise of secrecy. The menace of Communists in government service is a threat to our national security because of (1) opportunity to engage in espionage to the detriment of our national defense; (2) opportunity to influence the formulation and carrying out of governmental policies; (3) opportunity to promote Communist propaganda, creating disruption and undermining public confidence; (4) opportunity to recruit Party members in government service, or soliciting the aid of innocent co-workers in assisting them to carry out Party assignments; and (5) opportunity to place other Communists in government service. One person whose loyalty to the Communist cause exceeds his loyalty to the United States could, if properly placed, do irreparable harm to our security.'"

The committee recommended, *inter alia*:

"(11) To press with all vigor and energy and all its resources the investigation into Communism in our tax-supported schools, both common schools and institutions of higher learning. Communists already have made salutary inroads into our education system. Testi-

mony, including that of high ex-Communists, in the first and second committee reports, disclose the alarming progress that has been made.

"In the blue print for Communist infiltration the Communist objective is summed up in these simple words:

"'In destroying the capitalist monopoly of the means of production, the working class must also destroy the capitalist monopoly of education; that is, it must take possession of all the schools, from the elementary schools to the universities.' *(Program of the Communist International, adopted by the Sixth World Congress, Sept. 1, 1928, Moscow. 'Blue Print for World Conquest,' page 206.)

"As heretofore stated, your Committee had opportunity merely to scratch the surface of Communist infiltration in our tax-supported school system.

"(12) The successor committee, or a separate committee be authorized to fully investigate the manner in which textbooks and all other reading matter in our schools is chosen and approved, and that the Legislature make it mandatory to either delegate existing agencies or create a separate agency with the responsibility of stemming the flow of subversive reading matter that is finding its way into some of the classrooms of our schools."

Appendix C

I.

Schwartz, The Supreme Court, chapter 9, page 317:

"Perhaps the most striking judicial statement of the actual character of the American Communist Party is to be found in a 1950 opinion of Justice Jackson [concurring opinion in *American Communications Ass'n v.*

Douds, 339 U. S. 382, 413, 94 L. Ed. 925, 70 S. Ct. 674 (1949)], which is remarkable for the breadth of its language and its judicial notice of data not in evidence before the Court.

"From information before its several Committees [reads the opinion referred to], and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. A rough and compressed grouping of this data would permit Congress to draw these important conclusions as to its distinguishing characteristics.

"1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. . . .

"2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. . . .

"3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. It would be incredible naivete to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power.

"4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement. . . .

"5. Every member of the Communist Party is an agent to execute the Communist program.

"Although unsupported by the kind of evidence that would usually be required in a law court, the broad

indictment of the Communist Party in Justice Jackson's opinion comports with the common sense of the subject. . . ."

II.

Report of (United States) House of Representatives Committee on Un-American Activities relative to the Internal Security Act of 1950 (House Report No. 2980, dated August 22, 1950):

"NECESSITY FOR LEGISLATION

"The need for legislation to control Communist activities in the United States cannot be questioned.

"Over 10 years of investigation by the Committee on Un-American Activities and by its predecessor committee has established (1) that the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

"The Communist program of conquest through treachery, deceit, infiltration, espionage, sabotage, corruption, and terrorism has been carried out in country after country and is an ever-growing threat to the national security of this and other countries. There is ample evidence that one of the primary objectives of the world Communist movement, directed from within

the most powerful existing Communist totalitarian dictatorship, is to repeat this pattern in the United States.

"There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement, in its ruthless and tireless endeavor to advance the world march of communism.

"The findings which support these conclusions, and the vast quantity of evidence on which they are based, are set forth in detail in the numerous reports which this committee and its predecessors have printed and circulated. Corroboration has been supplied by independent and exhaustive research by other committees of Congress.

"Concern over this threat is not limited to the legislative branch of our Government. At the present time 30 of the 70 major countries in the world have outlawed the Communist Party. Many other countries have adopted various legislative decrees against communism, and since 1947, the trend has been toward declaring all Communist activities illegal. Panama was the latest to take such action. This action came in April of this year. . . .

"Concern over the Communist threat has not been overlooked by the different State legislatures. At the present time 33 States have laws against the displaying of the 'Red' flag; 12 States have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; 16 have laws against the Communist Party candidates appearing on the election ballot; 19 States exclude Communists from public employment; 28 States require loyalty oaths of all employees; and 20 States require teachers to take loyalty oaths."

III.

Communist Control Act of 1954, August 24, 1954, chapter 886, § 2, 68 Stat. 775, 50 U. S. C. A., § 841.

"Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individu . views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their heirarchial chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government

of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed."

APPENDIX B

JOURNAL

In the Supreme Court of the State of Washington

Friday, March 20, 1959

HOWARD L. NOSTRAND and MAX SAVELLE, *Respondents*,

vs.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Appellants*.

No. 34451

JUDGMENT

Thurston County No. 28814

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 20th day of March, A.D. 1959, on motion of John J. O'Connell, Esquire, of counsel for the appellants, considered, adjudged and decreed that the decree of the said Superior Court be, and the same is hereby, reversed with directions to dissolve the permanent injunction restraining appellants from performing their official duties under the 1955 act (except § 3) with respect to

respondents and to dismiss their action. Neither party shall be allowed costs in this court.

And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

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Page 194

APPENDIX C

STATUTES INVOLVED

Chapter 254, Laws of 1951 (RCW, Chapter 9.81):

"Section 1. *Definitions.* For the purpose of this chapter:

"(1) 'Organization' means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence.

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of

which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

"(4) 'Foreign government' means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization."

Section 2 makes subversive activities a felony.

Section 3 makes it a felony to remain or become a member of a subversive organization or a foreign subversive organization "knowing said organization to be a subversive organization or a foreign subversive organization."

Section 4 disqualifies persons who have been con-

victed or found guilty under Sections 2 and 3 of the Act from holding public office.

Section 5 provides for the dissolution of subversive organizations and for disposition of their property.

Sections 6 through 8 and Section 10 were vetoed.

Section 9 makes provision for the attorney general to report to the governor and to the legislature biennially.

Section 11 provides that a subversive person, as defined in the Statute, in ineligible for employment to any office or position in the state, county, municipality or other political subdivision.

Sections 12 and 13 provide that the board or agency of government shall determine by appropriate rules and regulations and other procedures whether any employee is a subversive person.

Section 14 requires employees of the State or any political subdivision thereof to state under oath that he is not a subversive person as defined in the Act and provides that a person refusing to take the oath or who admits that he is a subversive person shall immediately be discharged.

Section 15 provides for discharge of subversive persons from employment if reasonable grounds on all the evidence exist to believe that the person is subversive. It provides that there must be cause for discharge with notice of charge and hearing under appropriate rules and regulations.

Section 16 provides for an affidavit to be filed by a candidate for public office that he is not a subversive person as defined in the law.

Section 17 makes misstatements punishable as perjury and provides for a penalty.

Section 19 states that nothing in the act is to be construed as authorizing civilian or military censorship, or the infringement of freedom of speech or other constitutional guarantees.

By Chapter 142, Laws of 1953, Section 1, subsection (5) of the 1951 Act, defining a subversive person, was amended to provide that a subversive person is one who, "with knowledge that the organization is an organization, as described in paragraphs two and three hereof, becomes or remains a member * * *."

By Chapter 377, Laws of 1955, this statute was further amended by adding two new sections and amending Sec. 12 (RCW 9.81.010). By this amendment, the entire tenor of the Act has been changed.

"SECTION 1. Section 12, Chapter 254, Laws of 1951, and RCW 9.81.070 are each amended to read as follows:

"Every person and every board, commission, council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. *Every such*

person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (Amendatory language emphasized)

"SEC. 2. Section 13, Chapter 254, Laws of 1951, and RCW 9.81.080 are amended to read as follows:

"The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment *and the requirement set forth in section 1 of this amendatory act, relative to membership in the communist party or other subversive organiztaion,* shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof.

"SEC. 3. *For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive Order No. 9835.* (Held unconstitutional by court below.)

"SEC. 4. *The communist party is a subversive organization within the purview of RCW 9.81 and membership in the communist party is a subversive activity thereunder.*"

APPENDIX D

THE OATH

The oath demanded of respondents provides as follows:

"UW-1006 7/55

"STATE OF WASHINGTON
"OATH FOR ADMINISTRATIVE RESEARCH, AND FACULTY PERSONNEL OF THE UNIVERSITY OF WASHINGTON

.....

Department, office or other agency (Print or type) — Title or Position (Print or type)

STATE OF.....

COUNTY OF.....
ss. AFFIDAVIT

"I, the undersigned, do solemnly swear (or affirm):

"(1) That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

"(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence;

"That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955, with full knowledge that the same is subject to the penalties of perjury.

.....
(Signature)

"Subscribed to and sworn to (or affirmed) before me this ..... day of ....., 1955, at .....
(City or Place) (State)

.....
Notary Public in and for the State of .....
residing at .....

(To be executed in duplicate, one copy to be retained by individual.)"

LIBRARY
SUPREME COURT, U. S.

FILED
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

NO. 342

HOWARD L. NOSTRAND and MAX SAVELLE,
Appellants,
vs.
THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Respondents.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

JOHN J. O'CONNELL,
Attorney General.

HERBERT H. FULLER,
Acting Chief Assistant Attorney General.

Office and Postoffice Address: Temple of Justice, Olympia, Wn

STATE PRINTING PLANT, OLYMPIA, WASH. 1959

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Attorney General

HERBERT H. FULLER,
Acting Chief Assistant Attorney General.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

NO. —

HOWARD L. NOSTRAND and MAX SAVELLE,
Appellants,
vs.
THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Respondents*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Pursuant to the provisions of Supreme Court Rule 16, paragraph 1 (a) and (b), 28 U.S.C.A., 1959 Supp., p. 10, appellees respectfully move the above entitled court to dismiss this appeal on the following grounds:

1. The appeal is not taken in conformity to Su-

preme Court rules, particularly rules 15, 1 (d) and 40, 1 (e), 28 U.S.C.A., 1959 Supp., pp. 9 and 25, respectively; and

2. Certain of the questions sought to be reviewed have not been properly raised or expressly passed on by the Supreme Court of Washington; and

3. It does not present any substantial federal question; and

4. The judgment rests on an adequate non-federal basis.

For convenience, the foregoing grounds urged by appellees as affording grounds for dismissal will be discussed in the order presented.

1. APPEAL NOT IN CONFORMITY TO SUPREME COURT RULES

Supreme Court Rule 15 provides in part that:

1. The jurisdictional statement required by paragraph 2 of Rule 15 shall contain in the order here indicated:

"* * *

"(d) A concise statement of the case containing the facts material to the consideration of the questions presented. If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific por-

tions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

Supreme Court Rule 40, relating to briefs, requires, in part:

"1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—

"* * *

"(e) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the printed record, e. g., (R. 12)."

Reference to appellants' statement as to jurisdiction discloses that on pages 4 and 5 thereof, under the title "Questions Presented," appellants list seven questions. These questions are each treated by appellants in their brief, pages 8 through 15, wherein they set forth their contentions and the precedential authority believed to be supporting or controlling. But, nowhere do appellants point out at what stage of the proceedings or in what method or manner, if any, each or any of these questions was raised in the Supreme Court of Washington. Nor do appellants point out that the questions which they pose were ever passed upon by that court. Of course, the jurisdictional statement contains no reference to the

places in the record where the questions posed were either raised in or ruled on by the Supreme Court of Washington.

At page 2 of appellants' jurisdictional statement appellants state, however, that they commenced this action "for the purpose of obtaining a declaratory judgment adjudicating Chapter 377, Laws of Washington of 1955, * * * to be violative of several provisions of the Constitution of the United States. * * * " And at page 7 of their brief supporting their assertion of jurisdiction it is said:

> "The federal questions sought to be reviewed here were raised in the Complaint (Tr. 5) and the federal and state constitutional issues were the only matters in controversy at all stages of the proceeding in the trial court and the State Supreme Court. * * * "

Examination of the complaint reveals the following pertinent allegations:

> "VII. The terms, provisions, and requirements of the Act and the oath are in violation of plaintiffs' rights, privileges and immunities under the Constitution of the United States in the following particulars:
>
> "1. They violate the rights guaranteed under the First Amendment as made applicable to the States by the Fourteenth Amendment;
>
> "2. They violate the rights guaranteed under the Fifth Amendment as made applicable to the States by the Fourteenth Amendment;
>
> "3. They deprive the plaintiffs of their rights without due process of law and deny them

the equal protection of the laws as guaranteed by the Fourteenth Amendment; and

"4. They constitute a Bill of Attainder contrary to Article 1, Section 10."

Appellees submit that even if the foregoing brief, vague references to the manner in which the federal questions presently posed by appellants were raised, is sufficient compliance with Supreme Court Rule 15, still their jurisdictional statement does not substantially comply with that rule, inasmuch as it does not show that such questions were ever passed upon by the Supreme Court of Washington.

It is therefore submitted that appellants' jurisdictional statement does nothing more than invite this court to search the entire record to determine whether the questions presented were ever passed upon by the Supreme Court of Washington. Accordingly, appeal should be dismissed under Supreme Court Rule 16, 1(a) which provides:

"The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules."

2. MOST QUESTIONS PRESENTED WERE NEITHER RAISED IN, CONSIDERED OR PASSED UPON BY THE SUPREME COURT OF WASHINGTON

Because of appellants' failure to comply with Supreme Court Rules 15 and 40 as stated above, appellees have searched the entire record in this case in order to determine whether, and, if so, when and in what method or manner the questions presented

by appellants in their jurisdictional brief (pp. 4 and 5) were ever raised or passed on by the Supreme Court of Washington. This search has failed to reveal that questions numbered one, two, four and five were ever raised in, or passed upon by, that court. In reaching this conclusion appellees have examined the complaint (R. 3-8), appellants' brief (entitled "Respondents Brief" in the court below), the unanimous, en banc, opinion rendered by the Supreme Court of Washington (Appendix A of appellants' jurisdictional brief) and the Certificate of Constitutional issue entered in the Supreme Court of Washington, May 28, 1959, by the Chief Justice thereof (R. 80). If appellees have been remiss in failing to identify the state of the proceedings below wherein any of these questions was raised or passed upon because the language and import of such questions does not correspond to the record, appellees respectfully invite appellants to point out, for the assistance of this court, wherein appellee's contentions in this regard are erroneous.

Because of the manner in which the sixth question presented by appellants is framed, appellees are unable to determine whether it was ever presented to or passed upon by the Supreme Court of Washington.

Appellees recognize and concede that the third and seventh questions posed by appellants were raised by brief in the Supreme Court of Washington and passed upon by that court in rendering its opinion.

Appellees therefore assert that, in any event, appellants' questions numbered 1, 2, 4, 5 and possibly 6, should not be considered by this court in determining jurisdiction. This, because this court is without jurisdiction to pass upon the questions not brought to the attention of the Supreme Court of Washington nor decided by it. *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 S. Ct. 176; *Cox v. Texas*, 202 U. S. 446, 50 L. ed. 1099, 26 S. Ct. 671. Accordingly, and particularly as to questions 1, 2, 4, 5 and 6, this appeal should be dismissed. *France v. Missouri*, 154 U. S. 667, 26 L. ed. 86.

3. NO SUBSTANTIAL FEDERAL QUESTION PRESENTED

Of the two questions posed by appellants which were clearly presented to and decided by the Supreme Court of Washington, appellees submit that neither presents a substantial federal question. The first of these, question 3, reads:

> "3. Does such oath violate Section 10, Article I, of the Constitution of the United States in that it constitutes a Bill or Attainder?"

This question was disposed of by the highest court of Washington in the following language:

> "Section twelve of the 1951 act, as amended by laws of 1955, chapter 377, § 1, requires only that every present or prospective public employee state, under oath, whether he or she is 'a member of the Communist party or other subversive organization' at the time the oath is taken. No punishment for past conduct or political activity is involved. Only one qualification precedent to public employment is imposed. In short, this section is clearly neither *ex post*

facto nor in the nature of a bill of attainder. *Huntamer v. Coe, supra,* [40 Wn. (2d) 767, 246 P. (2d) 489 (1952)]; *Garner v. Board of Public Works of Los Angeles,* 341 U.S. 716, 95 L. Ed. 1317, 71 S. Ct. 909 (1951); *American Communications Ass'n. v. Douds,* 339 U.S. 382, 413, 94 L. Ed. 925, 70 S. Ct. 674 (1949); *Pickus v. Board of Education of Chicago,* 9 Ill. (2d) 599, 138 N. E. (2d) 532 (1956)."

(See: Appendix A of appellants' brief, pp. 33, 34.)

That Article 1, § 9 of the Federal Constitution applies only to penal legislation is settled beyond peradventure of doubt. *Harisiades v. Shaughnessy,* 342 U.S., 580, 96 L. ed. 586, 72 S. Ct. 512; *Galvan v. Press,* 347 U.S. 522, 98 L. ed. 911, 74 S. Ct. 737. See also: separate opinion of Chief Justice Warren and Associate Justices Black, Douglas and Whittaker in *Trop v. Dulles,* 356 U.S. 86, 2 L. ed. (2d) 630, 78 S. Ct. 590. Appellees submit that the third question posed by appellants is not substantial.

The seventh question posed by appellants was also raised in and disposed of by the Supreme Court of Washington. That question reads as follows:

> "Does such oath requirement violate the 1st and 14th Amendments to the Constitution of the United States in that it abridges freedom of speech, freedom of association and assembly?"

The question was exhaustively explored and authoritatively resolved conversely to appellants' arguments by the highest court of Washington in its opinion. (See Appendix A, pp. 34 through 39 of

appellants' brief.) Other state courts had previously disposed of this argument likewise: *Pickus v. Board of Education of Chicago*, 9 Ill. (2d) 599, 138 N.E. (2d) 532 (1956); *Albert Appeal*, 372 Pa. 13, 92 A. (2d) 663 (1952). But the federal decision which appears to appellees as controlling on this issue is *Adler v. Board of Education of the City of New York*, 342 U.S. 485, 492, 96 L. ed. 517, 524, 27 A. L. R. (2d) 472, 476 (1952). It is submitted that the latter decision is dispositive of appellants' argument on the seventh question posed and that that question is not substantial.

4. THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

In 1955, the legislature of the State of Washington in the exercise of its sovereign power, amended its existing subversive activities act of 1951 (appellants' brief, pp. 61-65) to require that every public employee or applicant for public employment state under oath whether, at the time of taking the oath, he was a member of the Communist Party or other subversive organization. The Communist Party was by § 4, chapter 377, Laws of 1955 declared by the state legislature to be a subversive organization.

Obviously, § § 3 and 4 of the amendatory act (See appellants' brief, Appendix C, p. 66) were both designed to clarify the organizations deemed to be subversive. (Section 3 of the act was held unconstitutional by the Supreme Court of Washington.) This was in order to prevent the claims of public em-

ployees or prospective public employees that the Communist Party was not a subversive organization within the meaning of the definition contained in § 1 (2) of the 1951 act.

Section 11 of the 1951 act declared that subversive persons were ineligible for public employment. Since the Communist Party has been (by § 4, chapter 377, Laws of 1955) declared to be a "subversive organization," any person who "with knowledge that the organization is an organization * * * [subversive organization or foreign subversive organization, as defined elsewhere] becomes or remains a member" (§ 1 (5), chapter 254, Laws of 1951; as amended by § 1, chapter 142, Laws of 1953; appellants' brief, Appendix C, p. 65) is not eligible for public employment. Thus, present members of the Communist Party are excluded from positions of trust and confidence in local government. The oath, however, is not required with respect to public employment in non-sensitive occupation. (See § 2, chapter 377, Laws of 1955, appellants' brief, Appendix C, p. 66).

Hence, the question resolves itself into two parts:

a. May the state exclude present members of the Communist Party from sensitive areas of public employment?

b. Must a state continue to employ one who refuses to answer that he is not a member of the Communist Party?

The Supreme Court of Washington decided both of the questions in the affirmative.

In addition, and with respect to appellants' contention that the element of "scienter" of the subversive character of an organization is not present in the oath or chapter 377, Laws of 1955. See p. 43 of appellants' brief wherein the language of the Supreme Court of Washington is quoted in part as follows:

> " * * * As we interpret the form of oath, we find that this element is implied in every clause thereof and of the pertinent statutory provisions. See *Garner v. Board of Public Works of Los Angeles*, [341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317 (1951)], on which respondents rely, has no application."

Of course, this interpretation becomes a part of the statute itself for the purpose of determining its validity in the United States Supreme Court. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522, 3 L. ed. (2d) 480, 79 S. Ct. 437 (1959).

It seems apparent that there is, under the statutes here attacked, a "protection of the individual against arbitrary action" unlike the procedure involved in *Slochower v. Board of Education of the City of New York*, 350 U. S. 551, 100 L. ed. 692, 76 S. Ct. 637 (1955).

CONCLUSION

It is submitted that the statutes here involved, resting as they do on the police power inherent in the sovereign State of Washington are neither arbitrary, capricious or unreasonable. The decision of the Supreme Court of Washington rests upon valid and substantial non-federal grounds and for that reason, if for none of the other three reasons cited above, this appeal should be dismissed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General.

HERBERT H. FULLER,
Acting Chief Assistant
Attorney General.

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No. 342

In the

Supreme Court of the United States

OCTOBER TERM, 1959

HOWARD L. NOSTRAND AND MAX SAVELLE, *Appellants*,

vs.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, *Attorney General, State of* Washington, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

SOLIF M. RINGOLD
1201 Dexter Horton Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Attorneys for Appellants

METROPOLITAN PRESS AND WESTERN

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In the

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HOWARD L. NOSTRAND AND MAX SAVELLE, *Appellants*,

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No. - - - -

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

I. ARGUMENT AS TO FIRST 3 POINTS OF MOTION TO DISMISS

Appellees' Motion to Dismiss seems to encompass one basic argument: That the questions discussed in our Statement as to Jurisdiction were not raised or expressly passed on by the Supreme Court of the State of Washington and that therefore no substantial federal question

is presented. A brief analysis of the transcript on appeal and of our brief in the State Supreme Court will demonstrate the fallacy of this contention.

The seven questions presented in the Statement as to Jurisdiction all involve constitutional issues falling within the restrictions of the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of that Constitution. Appellees in their Motion to Dismiss, admit that the complaint, referred to in our Statement as to Jurisdiction, raised the issues of the statute's violation of the First and Fourteenth Amendments and Article I, Section 10 of the United States Constitution, and that the Statement as to Jurisdiction stated that the complaint raised those issues (St. 7).

The trial court held the State statute unconstitutional in its entirety and granted an injunction against its enforcement (Tr. 34). The State Supreme Court, in order to reverse the trial court and hold the statute constitutional, necessarily had to pass on the issues raised in the complaint, to-wit, the First and Fourteenth Amendments and Article I, Section 10.

Moreover, the Certificate of Constitutional Issue of Chief Justice Weaver of the State Supreme Court states (Tr. 80-81):

> "1. In the above-entitled cause there was drawn in question the validity of a statute of the State of Washington; namely, Chapter 377 of the Laws of 1955 of the State of Washington consisting of Sections 1, 2, 3 and 4 as applied to Howard

L. Nostrand and Max Savelle, respondents herein, on the ground of its being repugnant to the Constitution of the United States, particularly Article I, Section 10, the First Amendment and Section 1 of the Fourteenth Amendment."

2. Said questions were considered and passed upon by this Court. The decision of this Court rendered on the 29th day of January, 1959 and the Court's denial of respondents' petition for rehearing on March 20, 1959 were in favor of the constitutional validity of said statute, except Section 3 thereof, which was held by this Court to be unconstitutional and void."

Both at the trial level and on appeal the arguments were solely on these constitutional issues. Perhaps because this was so obviously the case, we did not elaborate the method in which these issues were raised and passed upon other than to state that they were raised in the complaint and that thereafter the constitutional issues were the only matters in controversy at all stages of the proceeding in the trial court and the State Supreme Court. The Statement of the case sets out the entire procedural history of this action with references to the record, and that, in itself, is a statement of the manner in which the federal questions sought to be reviewed were raised.

However, since appellees invite appellants to show that the theories and arguments in the seven questions presented in the Statement as to Jurisdiction, were argued and presented to the State Supreme Court, we submit the

following references in our brief to the State Supreme Court and in the Petition for Rehearing addressed to the same court, which presented that court with the issues encompassed by the questions presented in our Statement as to Jurisdiction.

> *Question 1.* Does the oath requirement violate the Fourteenth Amendment in that it requires automatic discharge of the State employee without hearing at which he can explain or defend (a) the reason, nature or basis of his membership in the Communist Party or other subversive organization; or (b) the reason or basis of his failure or refusal to take such oath?

On page 35 of our State brief we discussed *Slochower v. Board of Education*, 350 U. S. 551, 76 S. Ct. 637, 100 L. ed. 692, and quoted from that portion of the opinion in which the court, after discussing *Adler v. Board of Education*, 342 U. S. 485, 72 S. Ct. 380, 96 L. ed. 517, and *Garner v. Board of Public Works*, 341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317, states:

> "But in each of these cases it was emphasized that the State must conform to the requirements of due process . . . *The summary dismissal of appellant violates due process of law.*"

Later, in the Petition for Rehearing (Tr. 41-45), we made the argument that all of the cases relied on to support the State Court's opinion were cases involving hearings to determine the fitness of an employee for employment and stated with underlined emphasis:

"There is not one case decided by the Supreme Court of the United States which holds that the State may discharge an employee solely upon refusal to subscribe to an oath that he is not a subversive person."

All of the cases cited in support to the substantiality of the First Question in our Statement as to Jurisdiction, with the exception of *Bridges v. Wixon*, 326 U. S. 135; 89 L. ed. 2103, were also cited and discussed at length in our State brief.

Question 2. Does such oath requirement violate the Fourteenth Amendment in that it legislatively penalizes a State employee without notice, charges or hearing?

This question was raised by the same portions of our State brief as are mentioned with respect to the First Question, *supra*. Additionally, in discussing whether this State statute constituted a Bill of Attainder in our brief (pages 59-67), we referred at length to the fact that this was a legislative penalty without judicial safeguards and without any adjudicatory process.

Question 3. Does such oath requirement violate Section 10, Article I, of the Constitution in that it constitutes a Bill of Attainder?—

Appellees, in their Motion to Dismiss, admit that Question Three was presented to the State Supreme Court.

Question 4. Does such oath requirement violate the Fourteenth Amendment in that it conclusively presumes that membership in the Communist Party

is by itself grounds for dismissal of a State employee?

Question 5. Does such oath requirement violate the Fourteenth Amendment in that it penalizes membership in the Communist Party rather than acts constituting a substantive evil?

At pages 38 and 39 of our State brief we discussed *Konigsberg v. State Bar of California*, 353 U. S. 252, 77 S. Ct. 722, 1 L. ed.(2d) 810, pointing out that the mere fact of past membership in the Communist Party without anything more is not an adequate basis for concluding that a person is disloyal or of bad character. On pages 33-34 of our State brief, we discussed at length *Wieman v. Updegraff*, 344 U. S. 183, 73 S. Ct. 215, 97 L. ed. 216, and quoted the following portion of this court's opinion therein:

"Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

Question 6. Does such oath requirement violate the Fourteenth Amendment to the Constitution in that it penalizes a State employee for membership in the Communist Party even in absence of his knowledge that the Communist Party has for its purpose the violent overthrow of the government?

In our State brief, pages 24-43 were devoted to a recounting of the development of the concept of scienter as a prerequisite for loyalty oaths, discussing various decisions of this court involving the problems of scienter.

Moreover, the argument presented to this court in our Statement as to Jurisdiction regarding the substantiality of the Sixth Question is an almost verbatim quotation from the first and second pages of our Petition for Rehearing (Tr. 41-42).

> *Question 7.* Does such oath requirement violate the 1st and 14th Amendments in that it abridges freedom of speech, freedom of association and assembly?

Respondents admit that the Seventh Question was presented to the Supreme Court of the State of Washington.

While the wording of these Constitutional arguments as set forth in our State brief is not identical with the wording of the questions presented in the Statement as to Jurisdiction, the concepts involved in our arguments were clearly expounded to the State Supreme Court throughout our brief and Petition for Rehearing. Of the thirteen cases cited in our Statement as to Jurisdiction in support of the substantiality of the questions presented, all but *Bridges v. Wixon, supra,* were not only cited in our State brief, but were expounded and discussed there at considerable length. If these cases *support* the substantiality of the questions presented in our Statement as to Jurisdiction, then they certainly *posed* these same issues to the State Supreme Court. The fact that the State Supreme Court did not explicitly deal with most of these questions in its Opinion, while necessarily hold-

ing adversely to the constitutional concepts set forth therein, is a powerful reason why this court should accept Jurisdiction of this appeal.

II. ARGUMENT AS TO POINT NO. 4 OF MOTION TO DISMISS

The appellees' argument No. 4 deals solely with the question of scienter and is therefore directed solely to appellants' Sixth Question in the Statement as to Jurisdiction. It does not deal with the other six Questions Presented.

The State Supreme Court does state in words that scienter is implied in every clause of the oath and the statute. But the court goes on to hold that, since it is "common knowledge" that the Communist Party is a subversive organization (Tr. 67), specific knowledge of the Communist Party's purposes and activities is universal and is therefore to be implied conclusively. It is submitted that this holding is contrary to the specific holding of this court in *Wieman v. Updegraff*, *supra*, and therefore presents a substantial Federal question, regardless of the State Supreme Court's sophistry.

CONCLUSION

Since the questions presented to this court in the Statement as to Jurisdiction were raised by the initial pleadings and comprised the only issues before the courts below, it is submitted that the Statement as to Jurisdiction conformed to the Supreme Court Rules, that all ques-

tions presented were considered and passed upon by the Supreme Court of Washington, and that each of the seven questions presented are so substantial as to require plenary consideration for their resolution.

Respectfully submitted,

SOLIE M. RINGOLD
1201 Dexter Horton Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Attorneys for Appellants

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1959

No. 342

HOWARD L. NOSTRAND and MAX SAVELLE, *Appellants*,

v.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' OPENING BRIEF

SOLIE M. RINGOLD
1201 Dexter Horton Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Attorneys for Appellants.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 342

HOWARD L. NOSTRAND and MAX SAVELLE, *Appellants*,

v.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' OPENING BRIEF

Opinions Below

The Trial Court did not render an official or unofficial opinion. The opinion of the court below (R. 13 et seq.) is reported in 53 Wn.(2d) 460, 335 P.(2d) 10.

Jurisdiction

This is an appeal from a decision of the highest court of the State of Washington which decision sustained the validity of Chapter 377, Laws of Washington of 1955, (with the exception of Section 3) under the United States Constitution. The judgment of the court below was dated March 20, 1959 (R. 12). Notice of Appeal to

the Supreme Court of the United States was filed May 28, 1959 (R. 50). Time for docketing the case was extended to August 30, 1959, by stipulation and Order of the Chief Justice of the Supreme Court of Washington, on July 16, 1959, (R. 53-55). The record was filed with this court and the case docketed on August 24, 1959. Appellees moved to dismiss the appeal primarily on the ground that most of the questions sought to be reviewed were not properly raised or passed on by the court below and that the balance of the questions sought to be reviewed did not present any substantial federal question. On October 26, 1959, this Court noted probable jurisdiction (R. 55).

Jurisdiction of this Court has been invoked pursuant to 28 U.S.C., Sec. 1257 (2), *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.ed. 216 (1952) and *Slochower v. Board of Education of N. Y.*, 350 U.S. 551, 76 S.Ct. 637, 100 L.ed. 692 (1955).

Constitutional Provisions and Statutes Involved

The statute drawn into question on the ground that it is repugnant to the United States Constitution is Chapter 377, Laws of Washington 1955 (Revised Code of Washington, Sections 9.81.070 through 9.81.083) and is set out in full in Appendix A hereto. The most pertinent parts of this chapter are as follows:

> Sec. 1. "Every person and every board, commission council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees . . .

shall require every employee . . . to state under oath whether or not he or she is a member of the Communist Party or other subversive organization, and refusal to answer *on any grounds* shall be cause for immediate termination of such employee's employment . . ." (R.C.W. 9.81.070) (Emphasis supplied)

Sec. 4. "The Communist Party is a subversive organization within the purview of R.C.W. 9.81 and membership in the Communist Party is a subversive activity thereunder." (R.C.W. 9.81.083)

This Chapter has reference to and is defined by other sections of R.C.W. 9.81 which statutory provisions are lengthy and are therefore set forth in Appendix A hereto, together with all of Chapter 377.

The full texts of the United States Constitution that are involved in this appeal are set forth in Appendix B hereto attached. The citations are as follows:

U. S. Const., Section 10, Article I

U. S. Const., First Amendment

U. S. Const., Fourteenth Amendment, Section 1

Questions Presented for Review

The following questions are presented by this appeal:

1. Does the State's requirement of an oath pursuant to Section 1, Chapter 377, Laws of the State of Washington of 1955, of non-membership in the Communist Party or other subversive organization as a condition for state employment violate the Fourteenth Amendment to the United States Constitution in that it requires automatic discharge of a state employee solely upon his re-

fusal to subscribe the oath and no hearing is afforded the employee at which he can explain or defend (a) the reason, nature or basis of his membership in the Communist Party, or other subversive organization; or (b) the reason or basis for his failure or refusal to take such oath?

2. Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States in that it conclusively presumes that membership in a subversive organization is by itself grounds for dismissal of a State employee?

3. Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States in that it penalizes a State employee for membership in the Communist Party even in absence of his knowledge that the Communist Party has for its purpose the violent overthrow of the government?

4. Does such oath requirement violate Section 10, Article I, of the Constitution of the United States in that it constitutes a Bill of Attainder?

5. Does such oath requirement violate the First and Fourteenth Amendments to the Constitution of the United States in that it abridges freedom of speech, freedom of association and assembly?

Statement of the Case

The facts are not in dispute, the allegations of the Complaint were found true by the trial court (R. 8-10) and no exception was taken to such Findings.

The appellants are two full professors, one of History and the other of Romance Languages, employed under contract by the State of Washington to teach at the University of Washington (R. 8). Through their employment contracts and pursuant to statute and Rules and Regulations of the University, appellants have certain tenure rights and certain retirement benefits. The appellees, the University Board of Regents, President and Vice-President and the State Attorney General are charged with the duty of establishing, enforcing, carrying out and administering the provisions of Chapter 377, Laws of 1955, (R. 8-9).* The appellees have demanded that appellants sign and swear to an oath, a copy of which appears as Appendix C hereto (R. 5-6). The appellants in their Complaint alleged that unless they comply with such demands, their employment contracts with the University will be terminated as required by Chapter 377 (R. 2, 14).

The Complaint alleges that the terms, provisions and requirements of Chapter 377, Laws of 1955 and the oath are in violation of appellants' rights, privileges and immunities under the Constitution of the United States in the following particulars:

> (1) They violate the rights guaranteed under the First Amendment as made applicable to the States by the Fourteenth Amendment;

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*Because incumbents in the various offices have changed from time to time during the course of this litigation, the names of the appellees have been changed by stipulation and order to accord with the facts.

(2) They violate the rights guaranteed under the Fifth Amendment as made applicable to the States by the Fourteenth Amendment; (this is not asserted on this appeal)

(3) They deprive the appellants of their rights without due process of law and deny them the equal protection of the laws as guaranteed by the Fourteenth Amendment; and

(4) They constitute a Bill of Attainder contrary to Article I, Section 10.

The complaint also alleged that the Act and the oath e in violation of the State Constitution corresponding th the similar Federal Constitutional provisions but the ate Constitutional issues are not raised in this appeal.

The federal questions first raised in the complaint ere the primary issues at all stages of the proceeding the trial court and the State Supreme Court. Although ppellees' Answer (R. 6-7) raised some factual issues, ese issues were resolved in favor of the appellants in bstantially the same terms as were alleged in the com-laint (R. 8-10). The trial court found that Section 4 Chapter 377 violated the State Constitution in that embraced a subject not set forth in the legislative title, nd that Section 3 of Chapter 377, which declares "sub-ersive" all organizations on the U. S. Attorney General's st of subversive organizations, was an unconstitutional elegation of legislative authority (R. 10). That court eld that Sections 1 and 2 were inseparable from Sections and 4 and that therefore all of Chapter 377 was un-onstitutional and void (R. 10). An injunction was issued estraining the enforcement of the provisions of Chapter

377 (R. 11). From this injunction the appellees appealed to the State Supreme Court (Tr. 35). That court after briefs and argument held that Section 3 was unconstitutional but upheld the constitutionality and separability of Sections 1, 2 and 4 (R. 12). Due to a temporary and later a permanent injunction, issued by the trial court, appellees have made no efforts to enforce the provisions of this chapter with reference to the appellants. This final injunction is still in force pending this appeal (Tr. 82-83).

Summary of Argument

1. The oath requirement (Section 1 of Ch. 377, 1955, Laws of Washington) denies appellants' both procedural and substantive due process of law. Procedurally, as state employees, they are subject to being discharged from their positions summarily and automatically without opportunity for hearing or explanation, if they refuse "on any grounds" to execute the disclaimer oath. Substantively the oath requirement assumes that membership in a "subversive organization" is conclusive proof of unfitness for state employment. Moreover as interpreted by the court below, the individual's knowledge of the subversive nature of the Communist Party is presumed conclusively by reason "common knowledge."

2. The statute and the oath are invalid as constituting a bill of attainder. Prior to the decision in *American Communications Association v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.ed. 925 (1950) there would have been little question that the proscription by the legislature of members of the Communist Party would have

been considered as within the constitutional inhibition against bills of attainder. In *Douds*, the court avoided this result by finding that, absent ex post facto operation, the law under scrutiny was not an attainder. We submit that the requirement of ex post facto application is in error in the light of the origins of the constitutional provision and the decisions of this court.

3. The statute and the oath abridge the First Amendment freedoms as incorporated in the Fourteenth Amendment. The First Amendment protects the right of association and to remain silent. The guarantees of the First Amendment can be restricted only to prevent grave and immediate dangers which the state may lawfully protect. There is no demonstrated "clear and present danger" of any substantive or substantial evil with which the state may deal.

Argument

I

THE OATH VIOLATES DUE PROCESS

A. Automatic and Summary Discharge Without Opportunity for Hearing

Section 1 of Chapter 377, Laws of the State of Washington 1955 (R.C.W. 9.81.070, the statute under scrutiny) provides that refusal to execute the anti-subversive oath "*on any grounds* shall be cause for *immediate termination* of such employee's employment." R.C.W. 9.81.060 provides that no subversive person as defined in the Act, shall be eligible for employment by the State or political subdivision. These two sections mean that no matter what reason an employee has for belonging to a "subversive organization," nor what is the nature of his association therewith or the purpose thereof nor why he is unable or unwilling to execute the oath, he is subject to immediate and automatic discharge without any opportunity to be heard or to explain.

If there were no possible explanation or defense for a refusal to execute the oath or for affiliation with a subversive organization, then it might be said that hearing and notice would be unnecessary because such refusal or affiliation would be an inevitable concommitant of unfitness or disloyalty. It takes little imagination, however, to picture a number of situations which would cause an employee to refuse to sign this oath, which situations would in no way reflect on the employee's loyalty or fitness for the job. The employee might be associated with

a subversive organization for counter-espionage purposes in connection with either governmental or patriotic organizations. He might belong for the purpose of sociological study of "fringe organizations" or to satisfy his personal intellectual curiosity as to the functioning of such organizations, or he might belong solely to get the benefits from the wholly lawful aims of the organization or to assist in such lawful aims, while eschewing its disloyal aims. Cf. *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.ed. 2103 (1945).

In none of these situations would his membership reflect in the slightest degree on his loyalty or on his fitness for employment. Thus, even knowing membership in a subversive organization may be innocent in the sense that it involves neither a guilty mind nor a danger to the state. And yet his membership would either (1) be the basis for his refusal to take the oath and thus incur immediate dismissal from State employment under Section 1 or (2) would require a statement under oath that he is a member of the subversive organization which in turn would disqualify him for public employment pursuant to R.C.W. 9.81.060.

Moreover, by now it has been clearly demonstrated that such a "disclaimer oath" is exceedingly offensive to a large and respectable segment of our citizenry. A number of universities have refused substantial student scholarship grants under the National Defense Education Act of 1958 solely because this Act requires a student-applicant to execute an oath very similar to the oath prescribed

by the Washington State Statute.[1] Both individually and through such representative organizations as the Association of American Colleges, the Association of American Universities, the American Association of Land Grant Colleges and State Universities, the National Association of State Universities, the American Association of University Professors, and the Association for Higher Education of the National Education Association, the colleges and universities of the United States have vehemently protested this affidavit requirement in the National Defense Education Act and have urged its repeal.[2] If the taking of an oath such as the one under scrutiny is so deeply offensive to such an important segment of our society, it is reasonable to assume that the Washington disclaimer oath will be refused by at least some loyal and worthy citizens because of its offensive and insulting nature. And yet, such a refusal "on any grounds" shall be cause for "immediate termination" of employment. No opportunity is afforded a State employee to explain or defend his failure to execute the oath or his affiliation with a subversive organization.

In *Slochower v. Board of Education of New York*, 350 U.S. 551, 76 S.Ct. 637, 100 L.ed 692 (1955) it was pointed out that, even though "a person does not have

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[1]Yale University, Harvard University, Princeton University, Oberlin College and twelve other colleges have refused such grants for this reason. Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, April 29 and May 5, 1959. See also "Loyalty": An Issue of Academic Freedom by A. Whitney Griswold, Cong. Rec, Jan. 11, 1960, Appendix p. A111 to A113.

[2]See Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, April 29 and May 5, 1959.

a constitutional right to government employment," his dismissal "must comply with reasonable, lawful, and non-discriminatory terms." p. 555. In the majority opinion in that case, Mr. Justice Clark stated:

> "*Adler v. Board of Education*, 342 U.S. 485, 96 L.ed. 517, 72 S.Ct. 380, 27 ALR (2d) 472, upheld the New York Feinberg Law which authorized public school authorities to dismiss employees who, *after notice and hearing*, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that aim. Likewise, *Garner v. Board of Public Works*, 341 U.S. 716, 720, 95 L.ed. 1317, 1322, 71 S.Ct. 909, upheld the right of the City to inquire of its employees as to 'matters that may prove relevant to their fitness and suitability for public service,' including their membership, past and present, in the Communist Party or the communist political association." (Emphasis supplied)

In both *Adler* and the *Garner* cases, the employee was afforded an opportunity for a hearing at which he could explain his position and defend himself from any implications of disloyalty or unfitness.

Later, at page 559, the Court continued:

> "This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The state has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continual employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. *We hold that the summary dis-*

missal of appellant violates due process of law." (Emphasis supplied)

The oath requirement in the case at bar is as arbitrary and therefore unconstitutional as was the charter provision struck down in Slochower, for here, as there, "the questions asked (the oath required) are taken as confessed and made the basis of discharge." (*Slochower* at page 558.)

In the case at bar the State Supreme Court sought to uphold this statutory requirement on the ground that it constitutes an investigation of the qualifications (including loyalty) of state employees (R. 36). However, this very definitely is not an investigation but is an arbitrary prerequisite for obtaining or continuing to hold state employment. The automatic and summary manner of dismissal points up the conclusion that this requirement is not an inquiry into the fitness of the employee or into his loyalty, but is a purely punitive step to penalize those who will not or cannot take the disclaimer oath.

This requirement might exclude some disloyal or otherwise unfit employees, but at the same time it would also exclude loyal and fit employees without recourse or an opportunity to show their loyalty and fitness. Since indiscriminate classification of innocent with knowing activity offends due process, *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.ed. 216 (1952), an opportunity must be afforded the employee to prove his innocence despite membership in a subversive organization or refusal to take the oath. Such an opportunity is

not only lacking but is expressly prohibited by the use of the words "on any grounds" in the statute.

The Court below relies on *Lerner v. Casey*, 357 U.S. 468, 78 S.Ct. 1311, 2 L.ed.(2d) 1423 (1958); *Beilan v. Board of Education*, 357 U.S. 399, 78 S.Ct. 1317, 2 L.ed.(2d) 1414 (1958); *Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.ed. 517 (1952), and *Garner v. Board of Public Works*, 341 U.S. 716, 71 S.Ct. 909, 95 L.ed. 1317 (1951), to support its holding. Each of these cases involved hearings at which the employee could appear and argue his cause. When there is a hearing, the basis of an employee's failure to answer questions as to beliefs and associations can be shown, and his refusal thereby may become reasonably related to the question of his fitness as an employee. The hearing can therefore reasonably be termed an investigation of the qualifications of the employee. The *Adler* case emphasized that the right of the state was to "screen the officials, teachers and the employees as to their fitness to maintain the integrity of the schools as a part of the ordered society." p. 493. The opinion goes on specifically to discuss the question of procedural due process, p. 495:

> ". . . Disqualification follows therefore as a reasonable presumption from such membership and support. *Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut.* The holding of the Court of Appeals below is significant in this regard:

"'The statute also makes it clear that . . . proof of such membership "shall constitute prima facie evidence of disqualification" for such employment. But, as was said in *Potts v. Pardee* (220 NY 431, 433, 116 NE 78, 8 ALR 785, 17 NCCA 427): "The presumption growing out of a prima facie case . . . remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears and, unless met by further proof, there is nothing to justify a finding based solely upon it." Thus the phrase "prima facie evidence of disqualification," as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the prima facie evidence for which subdivision 2 of Section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law §12 subd. [d]). Should an order of ineligibility then iss[illegible] the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process.' 301 NY 476, at p. 494, 95 NE (2d) 806, at 814, 815." (Emphasis added)

Both the *Beilan* case and the *Lerner* case emphasize the fact that there had been a finding of "incompetency" and of "doubtful trust and reliability" respectively. These

findings were reached after hearings and in each case the discharging authority disclaimed any inference of disloyalty on the part of the discharged employee. In the instant case there is no provision or opportunity for a hearing and there is no provision for a finding of disloyalty or unfitness prior to discharge. The discharge is automatic and immediate and without a semblance of procedural due process.

It is significant that the opinion of the court below in the case at bar, failed to discuss, distinguish or even to refer to this Court's holdings in the following cases, although these cases were cited to the Court and discussed extensively by the appellants herein in their brief: *Slochower v. Board of Education, supra; Konigsberg v. State Bar of California,* 353 U.S. 252, 77 S.Ct. 722, 1 L.ed.(2d) 810 (1957); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.ed.(2d) 796 (1957), and *Sweezy v. New Hampshire,* 354 U.S. 234, 77 S.Ct. 1203, 1 L.ed.(2d) 1311 (1957). It is suggested that this failure was due to an unwillingness to recognize any constitutional limitations whatsoever upon the State's power and method of discharging its employees or of dealing in the area of loyalty inquiries. Appellants acknowledged that the state has the right to see to it that its employees are loyal, fit for their jobs, and are not attempting to excite revolution against the state. But Section 1 of Chapter 377 of the Laws of the State of Washington bears no reasonable relationship to such power and deprives the State employees of their liberty and property without due process of law.

B. Membership in a Subversive Organization is Made Conclusive Proof of Unfitness for State Employment.

In *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.ed.(2d) 810 (1957), this Court held that where, in a hearing before a Board of Examiners, an applicant for admission to the bar consistently refused to answer questions relating to his present and past affiliation with the Communist Party, the Board and the Appellate Court were without a basis for their finding that there was reasonable doubt as to his character or his loyalty and were not warranted in denying him admission to the state bar. In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.ed.(2d) 796 (1957), this Court held that past membership in the Communist Party was not an adequate basis for concluding that an applicant to the bar was disloyal or a person of bad character. These two cases, at their very least, stand for the proposition that, before the state can deprive a man of his livelihood, there must be a showing that reasonably tends to indicate his disloyalty or unfitness. Certainly Konigsberg's refusal to answer the many questions concerning his then present membership or non-membership in the Communist Party was at least as strong a basis for presuming disloyalty or unfitness for the bar as a refusal to sign the oath required by the Washington statute, which oath is not made at a hearing before a board of inquiry but is executed in a vacuum as an absolute prerequisite to retaining state employment.

In the case at bar, the statute proscribes and punishes not disloyalty or subversive activities but mere member-

ship. While it may be conceded that many members of subversive organizations are disloyal and hence unfit, the statute under inquiry would have it that every knowing member of a subversive organization, no matter what the basis or purpose or reason for his membership, is disloyal and unfit, conclusively and in all situations. It is thus an indiscriminate and unreasonable classification having an insufficient rational connection with disloyalty or unfitness to warrant denial of public employment. For, as stated in Section I.A. above, even a knowing membership in the subversive organization may be innocent in the sense that it involves neither a guilty mind nor a danger to the state. If it be accepted that a knowing membership in a subversive organization can be innocent, then classifying such membership indiscriminately with dangerous membership or membership for a disloyal purpose is an assertion of arbitrary power to the same degree as that held unconstitutional in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.ed. 216 (1952). In that case this court struck down a "test oath" as applied to a state college professor on the ground that the oath applied conclusively to both knowing and unknowing membership in the prescribed organization (p. 191):

> "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a

statute is patently arbitrary and discriminatory."

It must be remembered that the proscribed affiliation is not solely with the Communist Party, but also with any organization that fits the fairly general statutory description of a "subversive organization."

In *Schneiderman v. United States*, 320 U.S. 118, 87 L.ed. 1796, 63 S.Ct. 1333 (1943) this Court reversed an order of denaturalization which was based primarily on the appellant's association with the Communist Party, saying (p. 136):

> "At this point it is appropriate to mention what will be more fully developed later—that under our traditions, beliefs are personal and not a mere matter of association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

To say that "communists in the State of Washington operate under, and undeviatingly follow, policies laid down for them by the Soviet Government" (T. 39) may be true as a generalization. But to go from that generalization to imputing all the organization's beliefs to a specific John Doe because of his mere membership in the organization not only flies in the face of our experience among men and organizations, but is in direct conflict with our basic judicial and political traditions. If membership alone can be made conclusive evidence of evil acts, there is no reason why residence in certain defined areas cannot be made conclusive evidence of criminal acts, or the use of a certain jargon or patois proof of delinquency or perhaps even "subversion."

A recent decision in an analogous situation is the case of *City of Seattle v. Ross*, 154 Wash. Dec. (Adv. Sh.) 794, 344 P.(2d) 216 (1959) in which a person was convicted under an ordinance making it "unlawful for anyone . . . to frequent, enter, be in or be found in a place where narcotics are unlawfully used, kept or disposed of." The Washington Supreme Court interpreted this ordinance as establishing a conclusive presumption of guilt from the mere fact of the defendant's presence in such a place, and held that, because it afforded the defendant no opportunity to explain his presence, it constituted an abuse of the police power of the city. While conceding that if every person found in proximity to illegally kept narcotics were arrested, a considerable number of drug addicts and traffickers would meet their just punishment, the Court went on to say:

> "By the same token, if every child in a city beset with a problem of juvenile delinquency were confined to an institution, that problem would be eliminated. The Chinese, we are told, for a long time held the firm conviction that the only way to roast a pig was to put it in a family home and burn it. Both they and we, it is hoped, have long since learned that, with industry and the exercise of imagination and reason, the prize can be had without the sacrifice."

The Court held that there was not a sufficiently close rational connection between the defendant's presence in a narcotics resort and the evil aimed at, to-wit, drug traffic, to warrant a conclusive presumption, even though the ordinance, if enforced would almost inevitably catch and

punish some of the people and activities at which it was aimed. Cf. *Manley v. Georgia*, 279 U.S. 1, 73 L.ed. 575, 49 S.Ct. 215 (1929); *Tot v. United States*, 319 U.S. 463, 87 L.ed. 1519, 63 S.Ct. 1241 (1943).

So, in the instant case, the conclusive presumption of guilt by reason of membership in a subversive group would undoubtedly net some subversives but would also net and punish many completely innocent persons.

It must be borne in mind that the effect of this statute threatens not only to cut off appellants' livelihoods, terminate their tenure rights and affect their retirement benefits (T. 8), but also to injure and even destroy their standing in the community. For, as was stated in *Wieman v. Updegraff*, *supra*, at p. 191:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbors as a possible enemy.' . . ."

The fact that the oath requirement was actually intended by the Legislature as punishment rather than as a selective process is strongly indicated by the statutory termination of state employment upon refusal to execute the disclaimer oath "on any grounds." It is thus a punishment without regard to guilt, punishing the innocent along with the guilty on the basis of association alone. As such it offends due process.

C. No Scienter Requirement as to Membership in the Communist Party.

Prior to 1955 the Washington Subversive Activities Act specifically required knowledge of the revolutionary purposes of an organization, before one could be found to be a subversive person through membership. R.C.W. 9.81.010 (5). Section 4 of the 1955 Act specifically eliminated scienter (i.e., knowledge of the revolutionary nature of the organization as distinguished from knowledge of his membership in the organization) from the definition of a subversive person *vis a vis* membership in the Communist Party.

In its opinion, the court below stated that it interpreted the oath as implying scienter of the subversive character of a subversive organization in every clause thereof and of the pertinent statutory provision (R. 35). Shortly before this statement, however, the court said:

> "Even prior to the commencement of hostilities in Korea in 1950, numerous judges had recognized the communist party as a part of a world conspiracy having as its prime objective the overthrow of the United States government by force and violence, or whatever means possible, constitutional or otherwise . . . We can, and do now, hold likewise, *because the fact that the communist party is a subversive organization is now a matter of common knowledge.*" (R.32-33) (Emphasis supplied)

The Court seems to say that specific knowledge of the Communist Party's purposes and activities is universal and is therefore to be conclusively presumed. This negatives any possibility of innocent membership in the Com-

munist Party. It is submitted that this presumption is, therefore, contrary to the specific holding in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.ed. 216 (1952).

II

THE OATH REQUIREMENT IS VOID AS A BILL OF ATTAINDER

A. The Test of Attainder

The oath under consideration is not an oath of allegiance; it is not a pledge of adherence to the Constitution of the United States and of the State of Washington. This is a test oath, an expurgatory oath required by the state.

Bills of Attainder were considered by this Court in *Cummings v. Missouri*, 4 Wall. 277, 18 L.ed. 356 (1866), and *Ex parte Garland*, 4 Wall. 333, 18 L.ed. 366 (1866), where test oaths for attorneys, priests, candidates for public office and others who may have aided the South during the Civil War, were held to be Bills of Attainder. In *Cummings, supra*, Mr. Justice Field defined a bill of attainder as:

> ". . . a legislative act which inflicts punishment without a judicial trial . . . (the legislature is) creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals."

It will be noted that it *is the elimination of the adjudicatory process which offends the prohibition against*

the bill of attainder, not the fact that the attaint was ex post facto.

Mr. Justice Field continued:

> "We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law . . . . The deprivation of any rights, civil or political, *previously enjoyed, may be punishment*," 4 Wal. 320. (Emphasis supplied)

In *Ex parte Garland, supra*, Mr. Justice Miller, though dissenting, defined a bill of attainder (p. 388):

> "I think it will be found that the following comprise those essential elements of bills of attainder in addition to the one already mentioned (corruption of the blood), which distinguish them from other legislation and which made them so obnoxious to the statesmen who organized our government: 1. They were convictions and sentences pronounced by the Legislative Department of government instead of the Judicial. 2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule. 3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence or that of his counsel and no recognized rule of evidence governed the inquiry."

This definition was clear and unequivocal. It was followed in *U. S. v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.ed. 1252 (1946). Congress denied pay to named

government employees. Mr. Justice Black wrote the opinion of the court, striking down the legislation as a bill of attainder, "a legislative act which inflicts punishment without judicial trial." (p. 315). This Court held that *Garland* and *Cummings* stand for the proposition "that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

The Court then went on to say:

> "The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The constitution declares that that cannot be done either by a state or by the United States.
>
> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. *They intended to safeguard the people of this country from punishment without trial by duly constituted courts.*" (Emphasis supplied)

The instant case meets every test laid down by these cases. The Court in the cases cited—concerned with the fact that the adjudication was by the legislature—no issue was made as to whether past, present or prospective conduct was inhibited. The acts were held to be bills of attainder.

Story, in *Commentaries on the Constitution* (5th ed., 1891) Sec. 1344, put it:

> "In such cases, the legislature assumes judicial magistry, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions."

B. Attainder Need Not Be *Ex Post Facto*

Until after the decision in *U. S. v. Lovett, supra*, it was clear that there need be no *ex post facto* features attached to bring the act within the definition of Bill of Attainder, even though the act dealt with often had ex post facto features. *Cummings* and *Garland* could not at the time requested sign the oaths, nor could they in the future—Lovett was being punished simply for being Lovett, present and future. Mr. Justice Frankfurter concurring in *Lovett, supra*, said:

> "There was always a declaration of guilt either of the individual or the class to which he belonged. The offense might be a pre-existing crime or an act made punishable ex post facto. Frequently, a bill of attainder was thus doubly objectionable because of its ex post facto features. This is the historic explanation for uniting the two mischiefs in one

clause—'No Bill of Attainder or ex post facto Law shall be passed.' " 328 U.S. 323.

This observation had a rapid development. The late Chief Justice Vinson in *American Communications Association v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.ed. 925 (1950), found no attainder because the oaths reached only present beliefs and affiliations so that one "by a voluntary alteration of the loyalties which impel him to action" could become eligible to sign the oath.

Then in *Huntamer v. Coe*; 40 Wn.(2d) 767, 246 P.(2d) 489 (1952), the Supreme Court of Washington held that to constitute a bill of attainder the legislation must be *ex post facto*. The oath there considered involved candidates for public office who were required under the Subversive Activities Act of Washington (Ch. 254, Sec. 16, L. of 1951) to subscribe an oath that the candidate is not a subversive person as defined in the act. Mr. Justice Finley said:

> "(the statute) can and should be interpreted to require an oath of allegiance relating to the present and future; and that in this sense, the legislation should not be characterized as *ex post facto*, or in effect a bill of attainder. If Chapter 254 is susceptible of an interpretation requiring an oath covering and relating to past conduct—political or otherwise—it would in our opinion and under existing authorities be unconstitutional. We believe such an interpretation of the pertinent provisions of Chapter 254 is not mandatory or the only one possible . . . 'In other words, we think the statute in question can and should be interpreted in a present and prospective sense insofar as the requirement of an oath

or affidavit is concerned, and as so interpreted, that it is not unconstitutional, that is, *ex post facto*, or in effect a bill of attainder.' " p. 776.

But in *Cummings v. Missouri*, *supra*, the court was concerned with the present and prospective requirements of the oath. The English case of *Gaines v. Buford*, I Dana 481 (1833), is quoted with approval:

> "A British Act of Parliament might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury. . . . ."

Mr. Justice Field continued:

> "If these clauses . . . had declared that all priests and clergymen within the State of Missouri were guilty of these acts . . . and hence (should) be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not by a day designated, do certain specified acts, they would be no less within the inhibitions of the Federal Constitution.
>
> "In all these cases, there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals." p. 324.

We suggest that this Court re-examine the premise of

Douds and Garner: that legislation, which has present and prospective operation is not a Bill of Attainder. Neither history nor logic will support this conclusion.

To the framers of the Constitution the conduct of the American States during the Revolution offered strong and persuasive reasons for including the provision against bills of attainder. Judge Cooley said:

> "The thoughtful reader will not fail to discover, in the acts of the American States during the Revolutionary period, sufficient reason for this constitutional provision, even if the still more monitory history of the English attainders had not been so freshly remembered." I. Constl. Limitations, (8th Ed) 538.

At least two acts of the Pennsylvania Assembly which were bills of attainder had prospective application. In *Respublica v. Gordon*, 1 Dall. (Pa.) 233, 1 L.ed. 115 (1788), the Supreme Court of Pennsylvania stated:

> "The defendant was included in an act of proclamation issued during the late war, and not appearing within the time prescribed, was attainted of treason for adhering to the King of Great Britain, in consequence of which his estate was confiscated to the use of the commonwealth."

An act passed on March 6, 1778, provided for the attainder of various traitors unless they appeared and conformed to the law. *Pemberton v. Hicks*, 3 Dall. (Pa.) 479, 1 L.ed. 687 (1798).

The most atrocious attainder instance in history was prospective. The Great Act of Attainder was passed by the Parliament assembled by James II in Dublin in 1688.

Between two and three thousand persons were attainted, sentenced to death and their property confiscated if they failed to appear at an appointed time. *Macauley's History of England*, Ch. 12 (Standard Library Edition), Vol. V, pp. 213-216. It seems clear to us that these examples must have been fresh in the minds of the authors of the Constitution.

The prohibition against bills of attainder was passed by the Constitutional Convention without debate.

> "In the Convention it was moved by Mr. Gerry and Mr. McHenry that the 'legislature shall pass no bill of attainder or ex post facto law.' Mr. Gouverner Morris thought the precaution as to ex post facto laws unnecessary, but essential as to bills of attainder.
>
> "Mr. Ellsworth maintained that there was no lawyer, no civilian, who would not say, that ex post facto laws were void of themselves. And, therefore, it was unnecessary to prohibit them." 1 Watson, Constitution of the United States, 733-4.

If it was clear that *ex post facto* laws were void of themselves would this then not be true of bills of attainder if they were limited to punishment for past conduct only? And, if bills of attainder were by definition intended only to include punishment for past conduct, why include the provision at all? Surely the prohibition of "ex post facto laws" historically would have been adequate and comprehensive.

Story, in *Commentaries on the Constitution* (5th ed. 1891) Sec. 1345, had this to say:

> "The terms, *ex post facto* laws, in a comprehensive sense, embrace all retrospective laws, or laws governing or controlling past transactions, whether they are of a civil or a criminal nature. And there have not been wanting learned minds, that have contended, with no small force of authority and reasoning, that such ought to be the interpretation of the terms in the Constitution of the United States."

The rationale of distinguishing *Cummings*, *Garland* and *Lovett* as cases punishing individuals for past actions and, therefore, being bills of attainder; and *Douds*, *Garner* and the instant cases as proscribing only future conduct and therefore not coming within the constitutional inhibition, escapes us. Certainly the proscription for the present and in the future is founded upon the legislature's dislike, formed in the past for easily ascertainable members of a group, for their past shortcomings.

> "This, of course, flies in the teeth of the Garland and Lovett cases, in both of which the alleged fault which gave rise to the disqualification was highly pertinent to future conduct. If there is a difference in the legislative intent, the Court can have discovered it only by intuition. But the premise as well as the application seems to be unsound. It means that a completely capricious measure must escape condemnation as a bill of attainder because it is grounded on no offense whatever. If the legislature is forbidden to punish a man for cause, surely it is forbidden to punish a man without cause . . ." *Wormuth, Legislative Disqualification as Bills of*

Attainder, 4 Vand. Law Review 603, at 607.

Wormuth further points out that if to be invalidated a bill of attainder must be *ex post facto*, then legislatures are in no way restrained from putting a man to death by vote, if only his life has been so blameless that he escaped all reproach for past conduct.

One final point must be touched upon in this section of the brief. The legislature, of course, has the right to establish relevant disqualifications for an office or an occupation. First, these disqualifications must have a rational relationship to fitness; *Schware v. Board of Bar Examiners, supra; Konigsberg v. State Bar of California, supra*, and secondly,

> "they cannot be . . . grounded on a legislative determination of fault or culpability in the persons disqualified, but a legislative disqualification so grounded is a bill of attainder. So the *Lovett* case stands for the proposition that the legislature may not apply a valid standard of disqualification to individuals and itself determine their blameworthiness." *Wormuth, supra*, at page 614.

If we assume that the legislature may properly disqualify persons who engage in or advocate, abet, advise or teach the overthrow of the government, it still cannot proscribe members of the Communist Party without permitting them to demonstrate that they abjure the "disloyal" thoughts or beliefs which the legislature has determined are blameworthy. It is this determination of fault by the legislature which offends the Constitution.

III

THE OATH ABRIDGES FREEDOM OF SPEECH, ASSOCIATION AND ASSEMBLY

A. The Right of Association Is Protected by the First and Fourteenth Amendments, and Article I, Sections 4 and 5 of the State Constitution.

Whether the plaintiffs here are members of a proscribed organization or not is beside the point. Freedom of speech is freedom with respect to all speech and encompasses the freedom not to speak—to remain silent. To force an American to publicly profess any statement of belief is to violate the First Amendment. This principle was eloquently expressed by Mr. Justice Jackson, speaking for the majority of the court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.ed. 1628 (1943), where religious convictions of school children against saluting the flag were sustained:

> "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." U.S. 642.

To associate, to affiliate, even with the Communist Party, is a lawful activity protected by the Constitution.

In *American Communications Assn. v. Douds*, 339 U.S. 382, 413, 414, 70 S.Ct. 674, 94 L.ed. 925 (1950), Mr. Justice Vinson fully recognized that the right of asso-

ciation was protected by the First Amendment, and that it was abridged by virtue of the Anti-Communist oath required of labor union officers, although he found a countervailing interest in the "right of the public to be protected from evils of conduct" to justify the abridgement. The Court said (p. 393):

> "By exerting pressures on unions to deny office to Communists and other identified therein, Sec. 9(h) undoubtedly lessens the threat to interstate commerce, but it has the further necessary *effect of discouraging the exercise of political rights protected by the First Amendment.* Men who hold union offices often have little choice but to renounce Communism or give up their offices. Unions which wish to do so are discouraged from electing Communists to office." (Emphasis supplied)

Mr. Justice Frankfurter in his concurring opinion in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.ed. 216 (1952) *supra*, said (p. 194):

> ". . . Since the affiliation which must thus be forsworn may well have been for reasons or for purposes as innocent as membership in a club of one of the established political parties, to require such an oath, on pain of a teacher's loss of his position in case of refusal to take the oath, penalizes a teacher for exercising a right of association peculiarly characteristic of our people. See Arthur M. Schlesinger, Sr., Biography of a Nation of Joiners, 50 Am. Hist. Rev. 1 (1944), reprinted in Schlesinger, Paths to the Present 23. Such joining is an exercise of the rights of free speech and free inquiry. By limiting the power of the State to interfere with freedom of speech and freedom of association, the

Fourteenth Amendment protects all persons, no matter what their calling."

In case after case this Court has dealt with the right of association as one of the rights protected by the First Amendment: *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.ed. 817 (1951); *American Communications Assns. v. Douds*, *supra*; *Garner v. Board of Public Works*, 341 U.S. 716, 71 S.Ct. 909, 95 L.ed. 1317 (1951); *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.ed. 754 (1947); *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L.ed. 430 (1945).

B. The Rights Protected by the First Amendment May Not Be Abridged Except to Correct Substantial Evils With Which the Legislature May Have the Power to Deal.

Where state action infringes upon First Amendment rights, that infringement must be directly related to a substantial evil sought to be met by the statute or other action—there must be a "clear and present danger." A statute curtailing or infringing rights of association or rights of speech cannot be punitive or arbitrary. There is no substantial evil toward which the oath in this case is directed.

In *Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.ed. 517 (1952), the court stressed the relationship between the oath and the public interest of protecting school children from subversive propaganda "sufficiently subtle to escape detection in the classroom." In none of these cases does the court allow infringement

of the First Amendment right to associate without first satisfying itself that the nature of the evil perceived by the legislature is of sufficient magnitude to warrant the infringement. These cases go no further; the evil is examined, whether it be in the area of political strikes, education, or public service, and abridgement of the First Amendment is permitted only to the extent of meeting that evil.

In *Danskin v. San Diego Unified School District*, 28 Cal.(2d) 536, 171 P.(2d) 885 (1946), the California Civic Center Act barred the use of school facilities to organizations advocating the overthrow of the United States or of the state by force, violence or other unlawful means, or by persons or organizations affiliated with such organizations (subversive elements). The Act defined "subversive elements" and provided that to determine whether or not the applicant was a "subversive element" the school board could require an oath.

Members and officers of the San Diego Civil Liberties Union, an affiliate of the American Civil Liberties Union filed an application for the use of a school auditorium. The school board granted permission on the sole condition that the applicant subscribe and file the following oath:

> "I . . . . on oath say:
>
> "I am a member of the San Diego Civil Liberties Committee . . . and one of the applicants for the use of (the) auditorium. I do not advocate and I am not affiliated with any organization which advocates or has as its object or one of its objects the

overthrow of the present Government of the United States or of any State by force or violence, or unlawful means."

Mr. Justice Traynor, speaking for the California Supreme Court, held that the oath requirement was unconstitutional, relying upon the fact that, even assuming the organization was "subversive," there was no showing that the use of the auditorium would in any way endanger the safety of the community. He said:

> "Freedom of speech and of peaceable assembly are protected by the First Amendment of the Constitution of the United States against infringement by Congress. They are likewise protected against infringement by state legislatures. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.ed. 430; *DeJonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.ed. 278. However reprehensible a legislature may regard certain convictions or affiliations, it cannot forbid them if they present no 'clear and present danger that they will bring about the substantive evils' that the legislature has a right to prevent."

and then continues at page 891:

> "Since the state cannot suppress free expression except in the presence of clear and present danger, it cannot enforce a precautionary measure that would deny the right of assembly to those whose political creeds it disapproves. . . . When one searches deeper for the reason that motivates the prohibition of such meetings there is no escaping the conclusion that the legislature denies access to a forum in a school building to 'subversive elements' not because it believes that their public

meetings would create a clear and present danger to the community, but because it believes the privilege of free assembly in a school building should be denied to those whose convictions and affiliations it does not tolerate. What it does not tolerate it seeks to censor. . . .

"Since the state cannot compel 'subversive elements' directly to renounce their convictions and affiliation, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. Such a condition is . . . unconstitutional."

and at page 893:

"If it is unconstitutional for the state to prohibit certain persons or groups classified as 'subversive elements' from exercising their rights of free speech and assembly at places where others are allowed to speak and assemble it is a *fortiori* unconstitutional to require proof from any persons or groups that they are not subversive elements."

In the case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.ed. 1628 (1943) *supra*, the court struck down an oath required of school children:

"To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the state as those we

deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." 319 U.S. 641.

Lawson v. Housing Authority of the City of Milwaukee, 270 Wis. 269, 70 N.W.(2d) 605 (1955), was an attack upon a law requiring tenants in public housing to take a loyalty oath that they are not members of the organizations on the Attorney General's List. The Supreme Court of Wisconsin struck down the oath as violative of the First Amendment of the Constitution and certiorari was denied by the Supreme Court of the United States. The court said (p. 613):

> "The decision in [*Douds*] makes it clear that if Resolution 513 [Loyalty Oath] is to be upheld against the charge that it invades freedoms guaranteed by the First Amendment, it must be upon the basis of computing the threat of danger to the successful operation of public housing projects which might result . . .
>
> "This court deems the possible harm which might result in suppressing the freedoms of the First Amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units in federally-aided housing projects. We hold the Gwinn Amendment to be unconstitutional and void" (p.615).

It is noteworthy that this Court in *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.ed.(2d) 1356 (1957), held that the countervailing interest of the state

which permits abridgement of free speech is the danger of advocacy or teaching of overthrow of the government by force or violence coupled with incitement to illegal action.

The oath in this case not only proscribes advocacy of forcible overthrow, but also advocacy or teaching the "alteration of the constitutional form of the government . . . by revolution . . ." (R. 5).

The word "revolution" does not necessarily mean the use of force or violence, or even illegality. The Washington legislature obviously felt it meant something else, otherwise the words would not have been used in the disjunctive, "by revolution, force or violence." The "industrial revolution" at once comes to mind as a legal "alteration" accomplished by "revolution."

Webster's New International Dictionary, 2nd Edition, defines "revolution" as follows:

> "Change, alteration."
> "A total or radical change, as a *revolution* in thought."
> "A fundamental change in political organization, or in a government or constitution."
> "The overthrow or renunciation of one government or ruler, and the substitution of another by the governed."

It is evident that "revolution" does not necessarily mean force, violence or the use of unlawful means.

By proscribing "alteration" by "revolution," and requiring an oath abjuring such advocacy the state has enacted legislation which "does not aim specifically at

evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U.S. 88, 97, 84 L.ed. 1093, 60 S. Ct. 736 (1940).

With these principles in mind, we consider the interest which must be balanced. It is clear that academic freedom must occupy a preferred status in our society, and that freedom of expression will be protected against impairment by the state. In *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.ed.(2d) 1311 (1957), this Court said:

> "To impose a straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new majority and understanding; otherwise our civilization will stagnate and die." p. 250.

Justices Frankfurter and Harlan concur:

> "These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that in-

evitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." p. 262.

"I do say that in these matters of the spirit inroads on legitimacy must be resisted at their incipiency. This kind of evil grows by what it is allowed to feed on. The admonition of this Court in another context is applicable here. 'It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' *Boyd v. United States*, 116 U.S. 616, 635, 29 L.ed. 746, 752, 6 S.Ct. 524." p. 264.

"For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinate interest of the state must be compelling." p. 265.

The Court below sought to justify the oath requirement by the state under ". . . the power to protect the students therein against the possible exertion of subversive influence by their teachers or other instructors." (R. 35)

Where is the "clear and present danger" of a "substantial evil?" Certainly it cannot be said realistically that "possible exertion of subversive influence" is a substantial evil which may harm and injure society. To permit proscription of speech on this basis would truly impose a straight jacket upon and stifle intellectual pursuits.

Nor can we perceive a "substantial evil" flowing from

the advocacy or teaching of "revolution" by peaceful means, which the oath proscribes.

CONCLUSION

The decision below should be reversed and the cause remanded with instructions to issue a decree declaring that Chapter 377, Laws of 1955 of the State of Washington violates the Constitution of the United States, and is therefore void and of no effect and a further decree that the appellees herein be permanently restrained from establishing, enforcing, carrying out, and administering the provisions of said Chapter and from requiring appellants to execute any oath pursuant to said Chapter.

Respectfully submitted,

SOLIE M. RINGOLD
1201 Dexter Horton Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington

Attorneys for Appellants

APPENDIX A

Statutes Involved

Chapter 254, Laws of 1951 (R.C.W., Chapter 9.81):

R.C.W. 9.81.010:

"Section 1. Definitions. For the purpose of this chapter:

"(1) 'Organization' means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action of advancement of views on any subject or subjects.

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy, or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence.

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form

of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

"(4) 'Foreign government' means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization."

R.C.W. 9.81.020:

Section 2 makes certain subversive activities a felony.

R.C.W. 9.81.030:

Section 3 makes it a felony to remain or become a member of a subversive organization or a foreign subversive organization "knowing said organization to be a subversive organization or a foreign subversive organization."

R.C.W. 9.81.040:

Section 4 disqualifies persons who have been convicted or found guilty under Sections 2 and 3 of the Act from holding public office.

R.C.W. 9.81.050:

Section 5 provides for the dissolution of subversive organizations and for disposition of their property.

Section 6 through 8 and Section 10 were vetoed.

R.C.W. 9.81.130:

Section 9 makes provision for the attorney general to report to the governor and to the legislature biennially.

R.C.W. 9.81.060:

> "No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state."

R.C.W. 9.81.070 and 9.81.080:

Sections 12 and 13 provide that the board or agency of government shall determine by appropriate rules and regulations and other procedures whether any employee is a subversive person. These sections were carried over into the 1955 Act with amendments by addition, and are set out verbatim *infra.*

R.C.W. 9.81.085:

Section 14 requires employees of the State or any political subdivision thereof to state under oath that he

is not a subversive person as defined in the Act and provides that a person refusing to take the oath or who admits that he is a subversive person shall immediately be discharged. This section has been superseded by the 1955 Act.

R.C.W. 9.81.090:

Section 15 provides for discharge of subversive persons from employment if reasonable grounds on all the evidence exist to believe that the person is subversive. It provides that there must be cause for discharge with notice of charge and hearing under appropriate rules and regulations.

R.C.W. 9.81.100:

Section 16 provides for an affidavit to be filed by a candidate for public office that he is not a subversive person as defined in the law.

R.C.W. 9.81.110:

Section 17 makes misstatements punishable as perjury and provides for a penalty.

R.C.W. 9.81.120:

Section 19 states that nothing in the act is to be construed as authorizing civilian or military censorship or the infringement of freedom of speech or other constitutional guarantees.

By Chapter 142, Laws of 1953, Section 1, subsection (5) of the 1951 Act, defining a "subversive person," was amended to provide that a "subversive person" is one who, "with knowledge that the organization is an organi-

zation, as described in paragraphs two and three hereof, becomes or remains a member * * *."

By Chapter 377, Laws of 1955, this statute was further amended by adding two new sections and amending Sec. 12 (R.C.W. 9.81.010). By this amendment, the entire tenor of the Act has been changed.

"Section 1. Section 12, Chapter 254, Laws of 1951, and R.C.W. 9.81.070 are each amended to read as follows:

R.C.W. 9.81.070. "Every person and every board, commission, council, department, court or other agency, of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. *Every such person, board, commission, council, department, court, or other agency, shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his*

or her application for employment. (Amendatory language emphasized)

"Section 2. Section 13, Chapter 254, Laws of 1951. and R.C.W. 9.81.080 are amended to read as follows:

R.C.W. 9.81.080. "The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment *and the requirement set forth in section 1 of this amendatory act, relative to membership in the communist party or other subversive organization,* shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof."

R.C.W. 9.81.082. Sec. 3. *"For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive Order No. 9835."* (Held unconstitutional by court below.)

R.C.W. 9.81.083. Sec. 4. *"The communist party is a subversive organization within the purview of R.C.W. 9.81 and membership in the communist party is a subversive activity thereunder."*

APPENDIX B

Constitutional Provisions Involved

United States Constitution, Art. I, §10:

> "No State shall . . . pass any Bill or Attainder, ex post facto Law, or Law impairing Obligation of Contracts, or grant any Title of Nobility."

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fourteenth Amendment, Section 1:

> ". . . (N)or shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

APPENDIX C

The Oath

"UW-1006 7/55

"STATE OF WASHINGTON
"OATH FOR ADMINISTRATIVE RESEARCH, AND FACULTY PERSONNEL OF THE UNIVERSITY OF WASHINGTON

Department, office or other agency (Print or type) ..... Title or Position (Print or type) .....

STATE OF .....

COUNTY OF .....

ss. AFFIDAVIT

"I, the undersigned, do solemnly swear (or affirm):

"(1) That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

"(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of

any political subdivision of either of them, by revolution, force or violence;

"That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955, with full knowledge that the same is subject to the penalties of perjury.

.....

(Signature)

"Subscribed to and sworn to (or affirmed) before me this ..... day of ....., 1955, at ....., ...

(City or Place) (State)

.....

Notary Public in and for the State of .....

.....residing at.....

(To be executed in duplicate, one copy to be retained by individual.)"

BRIEF OF APPELLEES

Office Supreme Court, U.S.
FILED
MAR 5 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 342

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Appellants,

v.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

JOHN J. O'CONNELL,
Attorney General,

HERBERT H. FULLER,
Chief Assistant Attorney General,
Attorneys for Appellees.

Office and Postoffice Address: Temple of Justice, Olympia, Wn.

STATE PRINTING PLANT, OLYMPIA, WASH.

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JOHN J. O'CONNELL,
Attorney General,
HERBERT H. FULLER,
Chief Assistant Attorney General,
Attorneys for Appellees.

Office and Postoffice Address: Temple of Justice, Olympia, Wn.

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In the Supreme Court of the United States

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No. 342

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Since chapter 377, Laws of Washington 1955 is amendatory legislation (consisting of only four sections, two of which amend prior sections and two of which add new sections) amending Washington's

basic "Subversive Activities Act" of 1951, chapter 254, Laws of 1951, as amended by chapter 142, Laws of 1953, appellees have collected in the Appendix each of the sections brought into focus in this case, omitting therefrom those sections not pertinent. It is hoped that in this way, this court may more clearly follow these sections from enactment in 1951 through amendment in 1955.

Appellees concede that Article I, § 10, the First Amendment and Fourteenth Amendment, § 1, United States Constitution are involved in this appeal and were considered by the Washington Supreme Court in rendering its decision below, (R. 3, 26, 27-28, 35).

SUMMARY OF ARGUMENT

1. A state statute requiring a present public employee to execute an affidavit that he is not a present, knowing member of the Communist Party or other subversive organization does not constitute a denial of due process simply because it does not provide for a hearing upon the refusal of such employee to execute the affidavit prior to discharge. The state may properly exclude present, knowing members of the Communist Party or other subversive organization from its employ in order to maintain a trustworthy public service and need not afford a hearing to such persons as admit membership in the proscribed organization or refuse to state under oath whether they are such members.

2. The affidavit requirement does not constitute a bill of attainder. It is an employment qualification and not a penalty. Hence, the court should not reach appellants' argument that bills of attainder may be prospective as well as retrospective.
3. The affidavit requirement does not abridge the First Amendment, as incorporated in the Fourteenth Amendment. The interest of the government in having trustworthy public employees in sensitive positions clearly outweighs any limitation on the liberties of such employees, or prospective employees which might result from the affidavit requirement.

I

THE AFFIDAVIT REQUIREMENT DOES NOT VIOLATE DUE PROCESS

A. Appellants' Concessions

Before proceeding to discuss the questions presented by appellants for review, it seems appropriate to point out certain concessions which appellants have made and to point out certain qualifications which should be considered in connection with the questions posed.

1. Sensitive area of employment.

Appellants do not claim that their present employment as professors in the University of Washington is in a "non-sensitive" area. Properly so,

under the decisions of this court in *Adler v. Board of Education*, 342 U. S. 485, 27 A. L. R. (2d) 472 (cf. *Slochower v. Board of Education of New York*, 350 U. S. 551), *Beilan v. Board of Education*, 357 U. S. 399. This follows from the fact that under § 2, chapter 377, Laws of 1955 (RCW 9.81.080) the so-called "loyalty oath"

> "* * * shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof."

2. Scienter of organizational purpose.

Appellants appear to have completely abandoned their argument, so strongly urged in the Supreme Court of Washington (Brief of Respondents for the court below, pp. 24 through 43), that either the statute which requires the oath (§ 1, chapter 377, Laws of 1955; RCW 9.81.070) or the form of oath demanded (R. 5) offend due process because of indiscriminate classification of persons having knowledge of the organizational purpose with persons innocent, i.e., lacking knowledge of such purpose (cf. *Wieman v. Updegraff*, 344 U. S. 183). Appellants' argument to the court below was rejected with respect to both the statute involved (R. 20) and the

form of oath (R. 35) and does not appear to be involved herein. Rather, as will be later shown, appellants raise new and different arguments concerning "scienter" not presented to the Washington Supreme Court.

In considering the questions presented, three vitally significant factors must be borne in mind:

a. That the affidavit, negating membership in the Communist Party or other subversive organization is required only with respect to certain positions in public employment. §§ 1 and 2, chapter 377, Laws of 1955; RCW 9.81.070 and .080, Appendix.

b. The affidavit is, when required, one which requires the negation of *present* membership only in the "Communist Party or other subversive organization." § 1, chapter 377, Laws of 1955; RCW 9.81.070; R. 25, 27, 32, 34. *Past* membership is not involved.

c. The affidavit, when required, concerns only present membership in an organization *with knowledge* that such organization is a subversive or foreign subversive organization as defined. § 1, chapter 142, Laws of 1953; RCW 9.81.010; R. 20. The Communist Party is declared to be a subversive organization. § 4, chapter 377, Laws of 1955; RCW 9.81.083; R. 25, 32.

B. APPELLANTS' ARGUMENT REGARDING DUE PROCESS WAS NOT MADE TO THE COURT BELOW

Appellants' argument that the oath requirement violates due process because a present or prospective employee is not afforded a hearing for the purpose of explaining his subjective motive for present membership in an organization known by him to fall within the definition of subversive or foreign subversive organization, as those terms are defined in the 1953 Amendatory Act (RCW 9.81.010 (2) and (3), Appendix), is a complete departure from the argument made to the Supreme Court of Washington (Respondents' Brief for the court below, pp. 24 through 42). It was there argued that the oath requirement (RCW 9.81.080, Appendix) denied due process because scienter of the organizational purpose was not required of persons required to take the oath and that, therefore, an indiscriminate classification of the innocent with the knowing would result, contrary to the holding of this court in *Wieman v. Updegraff*, *supra*. But in making this argument appellants apparently overlooked or avoided the plain import of the 1953 act (chapter 142, Laws of 1953, amending RCW 9.81.010, Appendix) by which the definition of "subversive person" as theretofore contained in the basic act of 1951 was amended to include this essential element because of the objection noted in the *Wieman* case, *supra*. Because of this amendment, the state supreme court rejected appellants' argument that scienter or organizational pur-

pose was unnecessary under the 1955 amendment (R. 20; § 1, chapter 377, Laws of 1955, RCW 9.81-.070, Appendix). With reference to appellants' attack on the *form* of the oath demanded, the court found that the element of scienter "is implied in every clause thereof and of the pertinent statutory provisions" (R. 35).

Now—for the first time—appellants raise new and different arguments neither propounded to, nor considered by, the state courts. Appellants now contend that due process requires a hearing, either before a present employee is discharged or before an applicant for employment is rejected, at which time the employee or applicant is afforded the opportunity to explain why his *present* membership in an organization known to him to be subversive or foreign subversive (as defined in RCW 9.81.010 (2) and (3), Appendix) should not require that the mandates of RCW 9.81.060 and .070 (§ 11, chapter 254, Laws of 1951, and § 12, chapter 254, Laws of 1951, respectively; Appendix) be effected. It is evident therefore, that appellants' argument in this court is not an attack upon the validity of the amendatory act of 1955, construed by the Washington courts, but is rather an attack upon the basic act of 1951 and the amendatory act of 1953, inasmuch as it is RCW 9.81.060 (§ 11, chapter 254, Laws of 1951, Appendix) which precludes subversive persons from public employment and RCW 9.81.010 (§ 1, chapter 142, Laws of 1953, Appendix) which defines "subversive person." The

oath required by RCW 9.81.070 (§ 12, chapter 254, Laws of 1951) is nothing more than a statement that the affiant is not presently a subversive person who, under the basic (1951) and amendatory (1953) acts would be ir eligible for public employment.

Moreover, appellants' argument I-A, (Br. 9 through 16) is entirely premature. It should not be reached in this proceeding in the absence of some necessity for so doing. The fact is, that appellants have not made the requisite affidavit; nor have they refused to make it under the interpretation regarding scienter placed upon it by the Washington Supreme Court. They come before this court after refusing to make the affidavit regardless of the consequences of such refusal.

To illustrate, on page 42 of their brief in the Washington Supreme Court appellants (then respondents) asserted:

> "It is apparent from these cases that the mere fact of refusal to answer questions relative to 'subversive activities' cannot constitutionally be grounds for the discharge of a state employee. This the 1955 Act would do upon the mere refusal to answer questions or the refusal to execute the oath. It is also apparent that even actual membership in the Communist Party, which is proscribed the 1955 Act, cannot be grounds for discharge."

Answering this argument, the court below said:

> "The foregoing authorities clearly hold that, without violating any of the constitutional

> rights here invoked by respondents, the state is entitled to ask this question and to demand an answer as a condition of continued employment. Refusal to answer is sufficient grounds for discharge, whether it be for 'incompetency' (*Beilan v. Board of Education, supra*), or because by his lack of candor he provides evidence of his 'doubtful trust and reliability.' (*Lerner v. Casey, supra.*)" (R. 35)

Since appellants have not answered the question demanded, *i.e.*, whether they are members of the Communist Party or other subversive organization, it is clear that the consequences visited upon their failure to do so should not be considered, particularly in the absence of some direct acknowledgment that they cannot make the affidavit under the interpretation made by the Washington Supreme Court. Of course, appellants have made no such concession. They simply propound the hypothetical: "What *if* they do refuse on any ground to make the affidavit (*viz.* answer the question asked, on oath) and are subsequently discharged?"

In this respect, this case is precisely the same as *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716, wherein Mr. Justice Clark, speaking for the majority, said at page 720:

> "Petitioners have assumed that the oath and affidavit provisions of the ordinance present similar constitutional considerations and stand or fall together. We think, however, that separate disposition is indicated.

"1. The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge."

Cf. *Fox v. Washington*, 236 U. S. 273.

On page 10 of their brief appellants thrust three hypothetical situations at this court and invite an abstract, advisory ruling upon the constitutionality of the act with reference to the facts thus posed. In *Federation of Labor v. McAdory*, 325 U. S. 450, 461-462, this court, speaking through the late Mr. Chief Justice Stone, said:

"The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit, * * * This Court is without power to give advisory opinions. * * * It has long been its considered practice not to decide abstract, hypothetical or contingent questions, * * * or to decide any constitutional question in advance of the necessity for its decision, * * * or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, * * * or to decide any constitutional question except with reference to the particular facts to which it is to be applied, * * *

"A law which is constitutional as applied in one manner may, it is true, violate the Constitution when applied in another. * * * But 'Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications' this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.' * * * All these considerations forbid our deciding here the constitutionality of a state statute of doubtful construction in advance of its application and construction by the state courts and without reference to some precise set of facts to which it is to be applied. The declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered. * * *" [Cases omitted.]

It is noted that this case comes before this court on appeal from the judgment of the Supreme Court of Washington in a *declaratory judgment proceeding*. It should, therefore, be considered in light of the facts before the Washington courts; and appellants should not now be permitted to enlarge upon those facts by adding hypothetical situations calling for advisory opinions on matters not shown to be applicable to the facts of their own case. Particularly should this be true where, as here, these mat-

ters were not called to the attention of or ruled upon by, the Washington Supreme Court.

Appellees submit that there will be time enough to consider these arguments after appellants have signed the affidavit (in which case such arguments will be moot) or after they have been discharged because of their refusal to make the affidavit (in which case their arguments shall be removed from the realm of the hypothetical and shall become actual). In the latter event appellants would have the opportunity of presenting the arguments, presently raised here, to the Supreme Court of Washington.

In view of the foregoing, question number one (1) (appellants' brief, page 3), should not be considered by this court. Illustrative of this point is the complete failure of appellants to show in their brief opposing appellees' motion to dismiss (pages 4, 5) that their present argument was ever raised in the courts below, except by reference to quoted cases argued in connection with their contention that scienter of organizational purpose was lacking in the oath and the law under which it is required. Appellees submit that, in any event, the Supreme Court of Washington should be first given the opportunity to consider and pass upon this new, additional and different argument.

Notwithstanding the foregoing, appellees will proceed to discuss and rebut appellants' arguments made with respect to due process under questions numbered one (1) through three (3) presented for

review (Br. 3, 4). For convenience, appellants' format will be followed.

C. AUTOMATIC AND SUMMARY DISCHARGE WITHOUT OPPORTUNITY FOR HEARING

Appellants' argument (under subsection A of their brief) that the exaction of the oath violates due process may be summarized as follows:

1. Summary dismissal of a public employee (or rejection of an applicant for public employment) on his refusal to make the required statement under oath, violates due process because:

(a) Such employee (or applicant) is not given an opportunity to be heard or to explain the reason for his *present* membership in an organization *known* to him to be subversive or foreign subversive as defined in the act (§1, chapter 142, Laws of 1953; RCW 9.81.010 (2) and (3), Appendix). In this regard appellants envision three hypothetical situations wherein a subversive person (as defined in the act) might conceivably be entirely innocent of any disloyal objective. (His *subjective* motive might be innocent), (Br. 9, 10).

(b) A "large and respectable segment of our citizenry" oppose any "disclaimer oath" and the Washington oath may not be acceptable to "some loyal and worthy citizens because of its offensive and insulting nature." (Br. 10, 11.)

(c) The oath requirement is arbitrary because "the questions asked (the oath required) are taken

as confessed and made the basis of discharge." Quoting *Slochower v. Board of Education of New York*, *supra*, (Br. 11-13).

(d) While the oath requirement might exclude "*some* disloyal or otherwise unfit employees" [emphasis supplied] it would also exclude loyal and fit employees and is, therefore, indiscriminate in classification. *Wieman v. Updegraff*, *supra* (Br. 13).

(e) The court below did not discuss several decisions of this court cited to it because:

> "* * * It is suggested that this failure was due to an unwillingness to recognize any constitutional limitations whatsoever upon the State's power and method of discharging its employees or of dealing in the area of loyalty inquiries." (Br. 16.)

Before answering each of these contentions it is well to consider the scope of the constitutional provision deemed violated. What is "due process"? Quite recently, in *Bartkus v. Illinois*, 359 U. S. 121, Mr. Justice Frankfurter speaking for the majority discussed this broad concept at p. 126:

> "* * * In *Hurtado v. California*, 110 U. S. 516, this Court considered due process in its historical setting, reviewed its development as a concept in Anglo-American law from the time of the Magna Carta until the time of the adoption of the Fourteenth Amendment and concluded that it was intended to be a flexible concept, responsive to thought and experience—

experience which is reflected in a solid body of judicial opinion, all manifesting deep convictions to be unfolded by a process of 'inclusion and exclusion.' *Davidson v. New Orleans*, 96 U. S. 97, 104. Time and again this Court has attempted by general phrases not to define but to indicate the purport of due process and to adumbrate the continuing adjudicatory process in its application. The statement by Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. 319, has especially commended itself and been frequently cited in later opinions. Referring to specific situations, he wrote:

> 'In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.' 302 U. S., at 324-325.

"About the meaning of due process, in broad perspective unrelated to the first eight amendments, he suggested that it prohibited to the states only those practices 'repugnant to the conscience of mankind.' 302 U. S., at 323."

And what is the test of due process when applied to a statute of a sovereign state? In *In re Groban*, 352 U. S. 330, 334, this court adhered to its earlier decision in *Hebert v. Louisiana*, 272 U. S. 312, 316 that "the test to measure the validity of a state statute under the Due Process Clause" is whether, as

construed, the statute contravenes "fundamental principles of liberty and justice."

Does the statute presently before the court, bearing the interpretations placed upon it by the Supreme Court of Washington, deny to appellants some "fundamental principle of liberty and justice" (*In re Groban, supra*)? Or, does it deny to appellants the free exercise of some privilege or immunity which is "implicit in the concept of ordered liberty"? Is the statute, so construed, "repugnant to the conscience of mankind" (*Palko, supra*, 323)? Appellees submit that careful analysis requires negative answers to all of these questions.

The answers to these several arguments follow in the order above presented:

1. (a) Summary dismissal of a public employee (or the rejection of an applicant for employment) upon failure to meet reasonable standards prescribed by the legislature as prerequisite to continuing (or obtaining) such employment does *not* violate due process.

This court pointed out in *Slochower v. Board of Education of New York, supra*, on page 555 that:

> "To state that a person does not have a constitutional right to government employment is only to say that he must comply with *reasonable, lawful*, and nondiscriminatory terms laid down by the proper authorities." (Emphasis supplied.)

On page 559 the court continued:

"*The State has broad powers in the selection and discharge of its employees*, and it may be that proper inquiry to show Slochower's continued employment to be inconsistent with a real interest of the State." (Emphasis supplied.)

Garner v. Board of Public Works, *supra*, page 720, quoted, in part, with approval in the *Slochower* case, *supra*, held:

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

With particular reference to teachers, this court in *Adler v. Board of Education*, *supra*, page 493, after quoting the paragraph from *Garner*, *supra* just cited, went on to say:

"We adhere to that case. A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials,

teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. *In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.*" (Emphasis supplied.)

And in both *Lerner v. Casey*, 357 U. S. 468, and *Beilan v. Board of Education*, *supra*, a public employee could be discharged upon his refusal to answer pertinent questions relative to continued employment.

In *Beilan*, *supra*, dismissal of a teacher upon a finding of "incompetency" was approved where the teacher refused to answer questions pertaining to *past* communistic affiliations and activities, unlike this case where the inquiry concerns *present, knowing* membership.

Lerner, *supra*, sustained the discharge of a subway conductor who when asked whether he was then a member of the Communist Party refused to answer, claiming his privilege against self-incrimination. This court on page 472 accepted a finding:

> "* * * that upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability * * * continued employment would endanger national and state security."

This court on page 475 reaffirmed the reasoning of the New York Court of Appeals that the motorman had not been discharged

> "* * * because of any inference of Communist Party membership which was drawn from the exercise of the Fifth Amendment privilege nor because of the assertion of that constitutional protection, but rather because of the doubt created as to his 'reliability' by his refusal to answer a relevant question put by his employer, * * *"

It is submitted that the foregoing cases clearly demonstrate:

(1) That the public employer does have a right to prescribe reasonable qualifications, neither arbitrary nor discriminatory, which must be met by public employees or applicants for public employment, as a condition of holding, or obtaining, such employment. *Slochower*, *Garner*, *Adler*, *Lerner* and *Beilan*, all *supra*.

(2) That loyalty is a matter "relevant to * * * fitness and suitability for public service, [including] * * * membership, past or present, in the Communist Party or the communist political association" (*Garner*, *supra*), particularly so

with reference to teachers (*Adler, Beilan,* both *supra.*)

(3) That a present employee may be discharged upon refusal to answer whether he is presently a member of the Communist Party (*Adler, Beilan, Lerner,* all *supra*) whether it be upon a finding of "incompetency" (*Beilan, supra*) or of "doubtful trust and reliability," (*Lerner, supra.*)

Given the fact that the state has a right to ask the question it is submitted that it makes absolutely no difference whether the pertinent question is asked at a hearing or whether it is asked at some other time, whether it be upon application for employment or during the course of employment. Whatever reason the employee, or applicant, may have for refusing to answer the question, his refusal to answer may result in his discharge or rejection, either on grounds of "incompetency," "doubtful trust and reliability" or, perhaps, insubordination.

But to say that an employee may be discharged for failure to answer a pertinent question, on oath, is not to say that an affirmative answer to the question posed must be implicit, or necessarily implied, from the fact of refusal. Thus, refusal of appellants in the present case to subscribe the affidavit required by statute concerning their present membership in the Communist Party or other subversive organization cannot, and should not, be taken as an admission of the fact of membership. Such a conclusion is wholly speculative and conjectural, being based upon

unnecessary inference. For, as pointed out by appellants (in argument 1 (b) above, Br. 10, 11) a large segment of our citizenry may find that answering loyalty questions, under oath, is offensive and even insulting and may refuse to make the affidavit for that reason. In short, there may be many reasons why a particular employee may refuse to, and does not, make the affidavit, but such refusal does not necessarily connote that such person *could not* make it if he elected to do so.

Many statutes restrict the exercise of particular rights to persons of certain age groups. For example, candidates for public office, applicants for professional licenses, motor vehicle operators' licenses, tax exemptions, *inter alia*, may be required to meet a certain age requirement, and to declare their age upon oath. Could it be reasonably said that refusal to make such an affidavit disqualified a person because he was not of the prescribed age? Appellants would argue—quite consistently—that a hearing would be necessary before an application could be rejected. The applicant, in fact, has failed to meet the prescribed condition precedent to obtaining the objective desired.

1. (b) The fact that the oath is "offensive to a large and respectable segment of our citizenry," does not make it violative of due process.

In this regard, appellants' argument is addressed to the wisdom and expediency of the legislation under which the "non-Communist affidavit" is

required, not to the constitutional validity of the statute requiring it. This argument is one which should properly be made to the Washington legislature and not to this court, or any other. Moreover, a similar contention with respect to the propriety of the Hatch Act was summarily rejected by this court in *United Public Workers v. Mitchell*, 330 U. S. 75, 89.

1. (c) The oath requirement is *not* arbitrary in that "the questions asked (the oath required) are taken as confessed and made the basis of discharge."

In support of their argument to the contrary, appellants cite *Slochower, supra.* Several distinctions between the situation there involved and that now involved are patent.

Firstly, Slochower was discharged not for failing to answer a question posed by his employer, the City of New York, but because he invoked the privilege against self-incrimination before a subcommittee of the United States Senate. This court said at 350 U. S. at page 558:

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or * * * official conduct of city employees.' In this respect the present case differs materially from Garner, where the city

was attempting to elicit information necessary to determine the qualifications of its employees."

Secondly, as in *Schware v. Board of Bar Examiners*, 353 U. S. 232, the questions asked pertained to long-past rather than present membership in the Communist Party. It is significant that Slochower did testify that "he was not a member of the Communist Party," 350 U. S. at page 553. A discharge on the basis of past membership violates "fair play" since it allows no opportunity for rehabilitation. In the present case appellants apparently take the position that while the state may have a right to ask that question, it has not the right to have it answered.

Thirdly, as pointed out above, *Slochower, supra* differs from the present case in that no inference of disloyalty, membership in the Communist Party or other subversive organization (as defined), or the commission of any crime necessarily follows from the refusal to comply with the oath.

1. (d) The statute requiring the affidavit does not deny due process because some loyal and fit employees may be precluded from public employment on refusing to make it.

The *only* affidavit required by the statute (RCW 9.81.070, Appendix) is that an employee or applicant for employment, except as otherwise provided in RCW 9.81.080 (Appendix), state whether he *is* a member of the Communist Party or other subversive organization at the time of taking the oath (R. 27). Any person who is not a

member of such an organization can take the oath without fear of perjuring himself. But, for one reason or another, he may not do so. He may find the affidavit "offensive or insulting" and may not, or need not take it. This is purely a matter of election, open to all persons. Appellants' reference to *Wieman v. Updegraff*, *supra*, certainly does not stand for the proposition presently asserted. There it was the indiscriminate classification of members having knowledge of organizational purpose with members lacking such knowledge that was found indiscriminate and arbitrary. In addition, since the oath related to past as well as present membership there was nothing that a former member could do to "unlock the door" barring state employment. Here, even a present member "carries the key to unlock the door" since he may resign as a member and become eligible.

1. (e) The fact that the Washington Supreme Court failed to mention in its opinion several cases cited by appellants is not indicative of a violation of due process.

The tacit implication that the Washington Supreme Court ignored certain decisions of this court cited to it by appellants is palpably incorrect. Demonstrative of this is the fact that the court followed *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, in holding section 3 of the 1955 amendatory act unconstitutional and followed

Wieman v. Updegraff, supra, on the question of scienter of organizational purpose.

But why did not the court below discuss the *Slochower* and *Schware* cases, both *supra* (above discussed) or *Konigsberg v. State Bar of California*, 353 U. S. 252, and *Sweezy v. New Hampshire*, 354 U. S. 23 It is because they lacked pertinency and were so dissimilar on the facts as not to be persuasive.

Two cases involved teachers (*Slochower* and *Sweezy, supra*). One case involved the discharge of the teacher based upon his exercising the privilege against self-incrimination before a congressional sub-committee (*Slochower, supra*); while *Sweezy, supra*, involved a contempt of court conviction based upon the teacher's refusal to answer questions put to him in court (subsequent to his refusal to answer the same questions when posed by the attorney general of New Hampshire while acting as a one-man legislative investigating committee). In view of a state court interpretation of the definition of "subversive person," this court compared the situation to that of *Wieman v. Updegraff, supra.* Further, this court stated in the *Sweezy* case, *supra*, on page 249:

> "* * * The State Supreme Court carefully excluded the possibility that the inquiry was sustainable because of the state interest in the state university. There was no warrant in the authorizing resolution for that. 100 N. H., at 110, 121 A2d 783. The sole basis for the

inquiry was to scrutinize the teacher as a person, and the inquiry must stand or fall on that basis."

Like the *Schware* case, *supra*, *Konigsberg*, *supra*, involved an applicant for a state bar, not for a sensitive position which would come under the act in question. Konigsberg refused to answer certain questions of the bar examining committee on constitutional grounds. He was not advised that his refusal to answer such questions would, in itself, constitute grounds for his rejection. Nevertheless, he was rejected for refusal to answer questions pertaining to his association with the Communist Party, his criticism of certain public officials and their policies and his political associations and beliefs. He stated that he was not a communist, but declined to say whether he was a member of the Communist Party.

In each of these cases, except *Konigsberg*, the person involved had already answered in the negative when asked, under oath, whether he was then a member of the Communist Party.

Unlike Konigsberg, appellants here are aware that they will be discharged if they elect not to sign the affidavit required. They are so informed by the statute itself. And unlike, *Slochower*, *Sweezy* and *Schware*, all *supra*, the affidavit requires appellants to state that they are not now members of the Communist Party or other organization known to them to be subversive.

Appellees submit that appellants argument I-A

(Br. 9-16) does not support the proposition that dismissal is violative of due process simply because it is immediate. To deny to the public employer the right to have a question answered is to negate the right of the employer to ask it.

D. MEMBERSHIP IN A SUBVERSIVE ORGANIZATION IS MADE CONCLUSIVE PROOF OF UNFITNESS FOR STATE EMPLOYMENT

Under this heading appellants attempt to illustrate that the oath requirement denies due process because it precludes present members of an organization having knowledge that such organization is subversive (as defined in RCW 9.81.010 (2) and (3), Appendix) from holding sensitive positions in public employment. But that is not the question. Rather, may a state exclude present members of organizations known by them to be subversive (as defined) from public employment? The obvious answer is that to deny to the state the right to exclude persons committed to its destruction is to deny to the state the right of self-preservation, fundamental to men and states.

Appellants cite *Konigsberg* and *Schware*, both *supra*, as supporting their argument. They fail to recognize that there is a vast distinction between one's right to pursue a given calling and one's right to work for a particular employer. Neither of the cited cases involved public employment; both cases involved factually different situations. Those cases would be more in point if Schware or Konigsberg

were seeking election to public office in a state requiring the execution of a non-Communist affidavit as a condition precedent to the placing of his name on the ballot. But then they would run headlong into the decision of this court in *Gerende v. Election Board*, 341 U.S. 56, and would be required to make the affidavit.

It may be that knowing membership in a "subversive organization may be innocent in the sense that it involves neither a guilty mind nor a danger to the state" (Br. 18). But, of course, the danger to the state lies in the guilt of the mind. Both are difficult, if not impossible to measure. Because of the difficulty encountered in proving or disproving the subjective intent, purpose or motive for one's present membership in an organization bent on overthrowing, destroying or altering the government of the United States or the state of Washington by force or violence, our legislature has found it necessary to preclude all such members from public employment.

It should be pointed out that if a person is a member of an organization of the proscribed class and desires public employment, he may resign his membership and take the oath.

No useful purpose would be served in discussing appellants' quotes out of context from the *Wieman* case, *supra*. It is enough to say that the discrimination which appellants argue under this heading is the type approved by this court in *Gerende*, *supra*, and is not the type of indiscriminate classification (of

members having knowledge of organizational purpose with members lacking such knowledge) condemned in *Wieman, supra.*

Legislative bodies have often found it necessary to place a restriction on members of an organization or upon a particular class where the interests of the organization or class are inimical to a substantial governmental interest. This court has upheld such legislation as to the so-called Mormon Church (*Davis v. Beason*, 133 U. S. 333, *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U. S. 1), bank directors (*Board of Governors of Federal Reserve System v. Agnew*, 329 U. S. 441), civil servants, (*United Public Workers v. Mitchell, supra*), the Communist Party (*American Communications Association v. Douds*, 339 U. S. 382). In the *Douds* case, *supra*, in 339 U. S. on pp. 391, 392 this court mentioned additional cases.

E. No Scienter Requirement as to Membership in the Communist Party

Under this heading appellants argue that the statute violates due process because scienter of organizational purpose of the Communist Party is not required; therefore, the indiscriminate classification is arbitrary. *Wieman v. Updegraff, supra.*

§ 4 of the 1955 amendatory act (RCW 9.81.083, Appendix) provides:

> "The communist party is a subversive organization within the purview of RCW 9.81 and

membership in the communist party is a subversive activity thereunder."

The purpose of this declaration of fact was stated by the Washington Supreme Court:

"* * * * Obviously, sections one and four were designed to prevent any claim (which the legislature found to be entirely unfounded in fact) that the communist party was not, and is not, a 'subversive organization' as defined in the 1951 act, as amended." (R. 25)

Further:

"* * * That the communist party was, in fact, a subversive organization, as defined in the 1951 act, at the time that our legislature designated it as such (by § 4 of the 1955 act), can scarcely be doubted. (See appendix C.)

"Even prior to the commencement of hostilities in Korea in 1950, numerous judges had recognized the communist party as a part of a world conspiracy having as its prime objective the overthrow of the United States government by force and violence, or whatever means possible, constitutional or otherwise. Since then, Congress, in 1950, enacted legislation designed to control the communist party, and, in 1954, proscribed it. The courts of New Jersey and Pennsylvania take judicial notice of the fact. We can, and do now, hold likewise, because the fact that the communist party is a subversive organization is now a matter of common knowledge." (R. 32, 33)

Other cases holding likewise are collected in the margin.[3]

This statute was apparently intended to import constructive knowledge to any present member of the Communist Party that such organization is, in fact, subversive. Thus any present member of the Communist Party would be ineligible for public employment.

The statute does nothing more than add this well recognized fact to a general definition "subversive organization," further and more particularly defining it.

In *Konigsberg v. State Bar of California, supra*, it was emphasized that Konigsberg was not advised of the consequences which would be attendant upon

[3] Some courts which have taken judicial notice of the purposes of the Communist Party:

USCA (9th) Circ.
Carlson v. Landon, 187 F. 2d 994, 997 (1951).

D. C. Md.
U. S. v. Chandler, 152 F. Supp. 169, 175 (1957).

California
Black v. Cutter Laboratories, 278 P. 2d 905, 916, 43 C. 2d 788, 806 (1955); Certiorari dismissed, 351 U. S. 292, 76 S. Ct. 824, 100 L. ed. 1188.

Florida
State v. Kelly, 76 So. 2d 798, 801-802.

New Jersey
Laba v. Newark Board of Education, 3 N. J. 464, 129 A. (2d) 273 (1957).

New York
Dauman v. Board of Education, 113 N. Y. S. 487, 489 (1952).

Ohio: (Common Pleas)
Dworken v. Cleveland Board of Ed., 94 N. E. 2d 18, 25 (1950), affirmed 108 N. E. 2d 103, appeal dismissed.

(Court of Appeals)
Fairfax Airflex Co., Inc. v. United Electrical R. & M. Wkrs., 92 N. E. 2d 436, 455, 87 Ohio App. 371 (1950); Appeal dismissed, 93 N. E. 2d 409, 154 Ohio St. 106, 95 N. E. 2d 764, 154 Ohio St. 382.

Oregon
Application of Patterson, 318 P. 2d 907, 913, 210 Ore. 495 (1957).

Pennsylvania
Matson v. Margiotti, 88 A. (2d) 892, 895, 371 Pa. 188 (1952).
Albert Appeal, 372 Pa. 13, 92 A. (2d) 663 (1952).

his refusal to answer the questions posed by the bar examining committee. In this case, the statute itself imports to any employee, or applicant, particular notice that subversive persons cannot be employed in sensitive occupations in state government; that a person who is a member of the Communist Party is a subversive person and cannot be employed by the state while retaining such membership.

Appellants' argument here is comparable to that addressed to the Supreme Court of Washington on pages 42 and 43 of appellants' (then respondents') brief:

> "It is apparent from these cases that the mere fact of refusal to answer questions relative to 'subversive activities' cannot constitutionally be grounds for the discharge of a state employee. This the 1955 Act would do upon the mere refusal to answer questions or the refusal to execute the oath. It is also apparent that even actual membership in the Communist Party, which is proscribed the 1955 Act, cannot be grounds for discharge. To hold otherwise would be a denial of due process. It is interesting to note that *Yates v. United States*, 354 U. S. 298, refines the construction of the Smith Act and holds that advocacy alone of the overthrow of the government by force or violence is not sufficient to sustain a conviction; but that the advocacy or teaching must be coupled with concrete action for the forcible overthrow of the government. The proscribed advocacy or teaching under the Smith Act is such that incites to illegal action."

Appellees submit that much has been learned about the Communist Party and its tactics over the past forty years. But if any doubt as to the character of the organization existed prior to 1950, that doubt has since been dispelled by action. The Washington legislature would have been remiss in not taking notice of history and current events by failing to define the Communist Party as subversive.

As pointed out by the late Mr. Justice Vinson in *American Communications Assn. v. Douds*, 339 U. S. on pp. 400, 401:

> "* * * insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress. Cf. *United Public Workers v. Mitchell*, *supra* (330 US at 95, 102). In *Bridges v. California* (US), *supra*, we said that even restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need, come to this Court 'encased in the armor wrought by prior legislative deliberation.' 314 US at 261. Compare *Gitlow v. New York*, 268 US 652. The deference due legislative determination of the need for restriction upon particular forms of conduct has found repeated expression in this Court's opinions."

F. Recapitulation of Appellees' Answer to Due Process Argument

1. (This argument should not be considered by this court, but if the court holds otherwise:) The affidavit requirement does not violate due process in requiring summary dismissal of a public school teacher who refuses to state under oath whether he is presently a member of the Communist Party or other subversive organization as defined in the act. *Gerende, Garner, Adler, Beilan, Lerner*, all *supra;* cf. *United Public Workers v. Mitchell, supra;* distinguished as not pertinent: *Wieman v. Updegraff, supra.*

2. Due process is not denied by a state statute forbidding present, knowing members of the Communist Party or other subversive organizations from holding positions in sensitive areas of public employment: *Gerende, Garner, Adler, Beilan, Lerner.* Distinguishable as not applicable to public employment: *Schware v. Board of Bar Examiners,* and *Konigsberg v. State Bar of California,* both *supra.*

3. Statute which forbids present members of the Communist Party from holding positions in sensitive areas of public employment does not deny due process. *Beilan v. Board of Education* and *Lerner v. Casey,* both *supra.*

Appellees submit that the statute which requires the non-Communist affidavit as a condition of employment does not deny appellants due process. Appellants have failed to cite one decision of this court—

and it appears that none can be found which would support their propositions presently asserted. On the other hand, appellees have noted a series of cases (*Garner*, *Adler*, *Gerende*, *Beilan* and *Lerner*, all *supra*) which support conclusions opposite to those asserted by appellants. But perhaps the clearest answer to appellants' entire argument is found in *Lerner v. Casey*, 357 U. S., where at pages 477 to 478 this court said:

> "* * * This Court pointed out in Garner that a government employee can be required upon pain of dismissal to respond to inquiry probing into matters relevant to his employment, and that present membership in the Communist Party is such a matter. See also *Beilan v. Board of Public Education*, 357 US 399, *supra*. Certainly it is not a controlling constitutional distinction that New York, rather than impose on employees, as in *Garner* and *Beilan*, an absolute duty to respond to permissible inquiry upon threat of dismissal for refusal, has in these proceedings held that an employee lacking in candor to his governmental employer evidences doubt as to his trust and reliability. Finally, unlike the situation involved in *Konigsberg v. State Bar of California*, 353 US 252, *supra*, there is here no problem of inadequate notice as to the consequences of refusal to answer, for appellant was specifically notified that continued refusal might lead to his dismissal."

II

THE AFFIDAVIT REQUIREMENT DOES NOT CONSTITUTE A BILL OF ATTAINDER

The late Chief Justice Vinson in *American Communications Asso. v. Douds, supra*, p. 413, said:

> "The unions' argument as to bill of attainder cites the familiar cases, *United States v. Lovett*, 328 US 303; *Ex parte Garland* (US) 4 Wall 333; *Cummings v. Missouri* (US) 4 Wall 277. Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9 (h) [the "non-Communist affidavit" provision of the Taft-Hartley Act] is intended to prevent future action rather than to punish past action.
>
> "* * * Here the intention is to forestall future dangerous acts; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder."

In *Garner v. Board of Pub. Wks. of Los Angeles*, *supra*, p. 722, Mr. Justice Clark said:

> "* * * Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.' *Cummings v. Missouri* (US) 4 Wall 277, 320. We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

Appellants have not even tried to distinguish these cases which are dispositive of the entire bill of attainder argument, but have met them head-on by asking that the court "re-examine the premise of *Douds* and *Garner* * * *" (Br. 28, 29). Appellees submit that a re-examination of the premise in the light of the present case would, on the contrary, only buttress the court's conviction that the cases are correct.

The court has prudently not allowed *United States v. Lovett*, *supra*, to become a "Pandora's box;" this court has not allowed the vague contours of the concept of legislative punishment to overlap with other constitutional guarantees.

Appellants have cited no case in which this court has found a prospective act to be a bill of attainder. The acts struck down in the *Garland*, *Cummings*, and *Lovett* cases all involved punishment for past misdeeds. It is true that the punishment for past deeds was often conditioned on a future act such as

appearing within an appointed time, as numerous examples in appellants' brief reveal; but in each case the individual punished could not have avoided the sanction. For example, as one writer has pointed out in 28 Rocky Mt. L. Rev. 258:

> "Garland and Cummings could not alter the fact that they had supported the confederacy in the Civil War. Lovett, Dodd, and Watson could never again qualify as governmental employees whether they changed their loyalties or not."

Mr. Justice Frankfurter in a concurring opinion in *United States v. Lovett*, *supra*, page 323, said:

> "* * * But if it is not an *ex post facto* law, the reasons it is not are persuasive that it cannot be a bill of attainder."

Whether that statement was applicable in the *Lovett* case or not, we submit that it is certainly applicable in the present case. In other words, the fact that the action in the present case is prospective is convincing evidence that the act was not an act of punishment but rather a regulatory act to control the future action of those coming under the act. A member of a subversive organization cannot claim that he is penalized merely because the state requires him to resign as a condition of employment in a sensitive position. The requirement of non-membership is reasonably related to the end sought: trustworthy public employees.

Although appellees will not comment on this portion of appellants' brief sentence by sentence—this would merely constitute a chain of rejoinders—

appellees would like to make a few general observations. The most important shortcoming is the fact that although there is considerable discussion about bills of attainder being prospective, there is a dearth of argument to show that the affidavit requirement in question constitutes a bill of attainder even assuming, *arguendo*, that one could be prospective. To begin with, appellants have not shown any punishment and punishment is certainly a prerequisite. Appellants have shown nothing to negate the belief of the lower court that the oath requirement is a reasonable employment qualification. Mr. Wormuth, in 4 Vand. L. Rev. 603, whom appellants have quoted extensively (Br. 31, 32), assumes in his article that a penalty has been exacted. No penalty, however, has been exacted in the present case.

But, as Mr. Justice Frankfurter said in his concurring opinion in *United States v. Lovett*, *supra*, on page 324:

> "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, *Hawker v. New York*, 170 U. S. 189, or because he is no longer qualified, *Dent v. West Virginia*, 129 U. S. 114."

The court below (R. 27), relied upon the *Garner* case, *supra*, in holding that:

> "Section twelve of the 1951 act, as amended by Laws of 1955, chapter 377, § 1, requires only that every present or prospective public employee state, under oath, whether he or she is 'a member of the communist party or other subversive organization' at the time the oath is taken. No punishment for past conduct or political activity is involved. Only one qualification precedent to public employment is imposed. In short, this section is clearly neither *ex post facto* nor in the nature of a bill of attainder."

The fact is that the affidavit requirement in the present case works less of a hardship on the person affected than the ordinance and charter amendment involved in the *Garner* case, *supra;* for here a member of a subversive organization may resign today and take the oath tomorrow. (It will be recalled that the court was split on the question of whether the charter change of 1941 saved the "five years prior" clause of the 1948 ordinance from being *ex post facto.*) Justices Burton's and Frankfurter's objections to the *Garner* ordinance are not present here.

In the *Garner* case, *supra*, the court said on page 720:

> "* * * The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the

State and the United States. Cf. *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56, ante. Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers v. Mitchell*, 330 U. S. 75, 102, 103, and a State is not without power to do as much."

If the oath was an employment qualification in the Garner case, it is an employment qualification here. Appellants have not even attempted to distinguish the two cases in their brief.

In the *Douds* case, *supra*, the court said on page 391 in upholding the "non-Communist" affidavit provision of the Taft-Hartley Act that voluntary affiliations and beliefs justify an inference concerning future conduct when drawn by the legislature on the basis of its investigations.

If the oath was valid as regulating future conduct in the Douds case, it is so in the present case. Again, appellants have not even attempted to distinguish the two cases in their brief. Hence, as was said earlier, even assuming, *arguendo*, that a bill of attainder could be prospective, the act in question is not a bill of attainder but is an employment qualification. This being true, it would be gratuitous comment for the court to comment on the possibility of "prospective bills of attainder." It would involve overruling, in part, several cases.

Another minor point remains to be cleared up. Appellants stated (Br. 30):

> "'If it was clear that *ex post facto* laws were void of themselves would this then not be true of bills of attainder if they were limited to punishment for past conduct only? And, if bills of attainder were by definition intended only to include punishment for past conduct, why include the provision at all? Surely the prohibition of 'ex post facto laws' historically would have been adequate and comprehensive."

The answer is that a bill of attainder involves legislative punishment, but an *ex post facto* law might involve judicial punishment and hence not be a bill of attainder. The framers of the Constitution sought to prohibit both.

III

THE AFFIDAVIT REQUIREMENT IS NOT INVALID AS AN INFRINGEMENT OF THE FIRST AMENDMENT

A. The Affidavit Requirement Satisfies The "Clear and Present Danger" Test

Appellants begin their discussion of the First Amendment (made applicable to the states by the Fourteenth Amendment) with a statement which is hyperbole (Br. 33):

> "* * * Freedom of speech is freedom with respect to *all speech* and encompasses the freedom not to speak—to remain silent. To force an American to publicly profess *any state-*

ment of belief is to violate the First Amendment." (Emphasis supplied.)

Appellants made the same argument (Br. 35), somewhat qualifying this broad statement, as the unions unsuccessfully made in the *Douds* case, *supra*:

> "Where state action infringes upon First Amendment rights, that infringement must be directly related to a substantial evil sought to be met by the statute or other action—there must be a 'clear and present danger.' A statute curtailing or infringing rights of association or rights of speech cannot be punitive or abitrary. There is no substantial evil toward which the oath in this case is directed."

A consideration of the "clear and present danger" test, as it is applied today, is a convenient way of beginning the discussion of the larger question of whether there is here a violation of the First Amendment. The reasoning of the court in the *Douds* case, *supra*, is applicable here. Initially it must be conceded that beliefs are inviolate, *Cantwell v. Connecticut*, 310 U. S. 296. But, as the court pointed out in the *Douds* case, *supra*, on page 394:

> "* * * the attempt to apply the term, 'clear and present danger,' as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application, mistakes the form in which an idea was cast for the substance of the idea. The provisions of the Constitution, said Mr. Justice Holmes, 'are not mathematical formulas having their essence in their form; they are organic

> living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Gompers v. United States*, 233 U. S. 604." * * * It is the considerations that gave birth to the phrase, 'clear and present danger,' not the phrase itself, that are vital in our decision of questions involving liberties protected by the First Amendment."

On another occasion in *Noble State Bank v. Haskell*, 219 U. S. 104, 110, Mr. Justice Holmes said:

> "* * * we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual. * * *"

Nor was Justice Holmes alone in making such declarations; for in *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 414, the court said that:

> "* * * The Constitution was adopted to preserve our Government, not to serve as a protecting screen for those who while claiming its privileges seek to destroy it."

In *Schenck v. United States*, 249 U. S. 47, Justice Holmes enunciated the "clear and present danger" test. He said that the test is whether the words used are used in such circumstances and are of such

a nature as to create a clear and present danger that they will bring about the substantive evils which the legislature has a right to prevent. The court, commented on the *Schenck* case, *supra*, in the *Douds* case, *supra*, page 394:

> "* * * it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts. Freedom of speech thus does not comprehend the right to speak on any subject at any time. The important question that came to this Court immediately after the First World War was not whether, but how far, the First Amendment permits the suppression of speech which advocates conduct inimical to the public welfare. Some thought speech having a reasonable tendency to lead to such conduct might be punished."

On page 396 the court, with reference to the enunciation of the "clear and present danger" of Justices Holmes and Brandeis, said:

> "But the question with which we are here faced is not the same one that Justices Holmes and Brandeis found convenient to consider in terms of clear and present danger. Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in pro-

> tecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all."

The clarification of the "clear and present danger" test in two respects became more apparent in *Dennis v. United States*, 341 U. S. 494. Here, four members of an eight-member court held that the evil that the government has a right to avert under the "clear and present danger" test is not limited to the successful overthrow of the government by force and violence. It must be conceded that the evil must be serious and that *Thornhill v. Alabama*, 310 U. S. 88, is correctly cited by appellants (Br. 41) in so far as it is authority for the proposition that mere peaceful picketing does not constitute a sufficiently serious evil to justify the abridgement. But, since the Communist Party is rigidly disciplined and is controlled by a powerful foreign nation, it is not necessary for the Washington legislature to wait until just prior to the *putsch* in order to pass a law which has the effect of preventing subversive persons, as defined in the act, from occupying sensitive positions in state government.

Secondly, Chief Justice Vinson pointed out that the "clear and present danger" test is not an absolute standard. He reiterated his language of the *Douds* case, *supra*, in showing that there was a relative concept to be applied in the light of the particular circumstances of each case. The four members of the court on p. 510 adopted the test of Chief Judge

Learned Hand who wrote for the majority of the court below. Judge Hand said:

> "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

The Washington legislature found that the effect of employing in sensitive positions knowing members of subversive organizations, including the Communist Party, would lead to future conduct inimical to the state. The lengthy appendices to the decisions of the court below contain enough material to remove any doubt that the legislature acted mistakenly (R. 37 to 49).

It is even apparent from the adumbration of the "clear and present danger" test contained herein that the test has been met.

As the cases considered in the next section of the brief will reveal, the court also applies the "relativistic test" to other areas of the First Amendment.

B. In View of the Governmental Interest Involved, the Affidavit Requirement Does Not Violate the First Amendment

Appellants claim specifically that they have been deprived of (1) the freedom not to speak and (2) the "freedom of association." In answering, it is convenient to do as appellants have done and treat the two together.

Over a long period of years the decisions of this court have had the effect of pricking out a line de-

fining the ambit of the First Amendment. In the 1890 case of *Davis v. Beason, supra*, the court upheld the constitutionality of an Idaho statute disenfranchising all persons who were members of any association that taught or advocated polygamy. At that time polygamy was an integral part of the doctrine of the Church of Jesus Christ of Latter-Day Saints. A short time later the court decided *Church of Jesus Christ of Latter-Day Saints v. United States, supra.* Here the court upheld the power of Congress to void an unlawful association (*e.g.*, the Church of Jesus Christ of Latter-Day Saints) and to confiscate its property. The thrust of both decisions is to allow a legislative body to restrict or penalize membership in an association if the association has unlawful aims.

In the case of *United Public Workers of America v. Mitchell, supra*, the court upheld the so-called "Hatch Act," which had the effect of forbidding employees of the federal government from taking an active part in political management or political campaigns. The reasoning of the court was that Congress had acted reasonably in deciding that political activities by government employees menace the integrity and competency of the civil service system. Appellees submit that the danger to be guarded against in the present case is of even greater magnitude. In the *Douds* case, *supra*, as has been previously mentioned in another connection, the court upheld the non-Communist affidavit provision of the

Taft-Hartley Act and refused the union's claim that the affidavit infringed upon their constitutional right not to speak. Appellees submit that the danger in the present case, to-wit: the danger of using the captive audience of the classroom as a subversive political outlet is as great an evil as the threat of a political strike, which was the concern of the court in the *Douds* case, *supra*.

In *Dennis v. United States*, *supra*, the court upheld the Smith Act, which made it a crime to conspire to advocate the overthrow of the government. In the *Dennis* case, *supra*, one of the indictments was for conspiracy to organize the Communist Party whose purpose was to advocate the forceable overthrow of the government. In upholding the case the court in effect ruled that it is proper for Congress to declare criminal the formation of an association of persons for political purposes, if such an association were to advocate the forceable overthrow of the government.

In the case of *Gerende v. Board of Supervisors of Elections*, *supra*, the court indicated that eligibility for elective office could be conditioned on the execution of a loyalty oath negating knowing membership in organizations engaged in an attempt to overthrow the government by force and violence.

In the *Garner* case, *supra*, the court upheld a 1941 Los Angeles charter amendment as implemented by a 1948 ordinance which required all city employees to, *inter alia*, take an oath that at present

or within the five preceding years they had not advocated the overthrow of the government by unlawful means or belonged to organizations with such objectives. In effect, the court held that if the public employee involved wished to continue his employment his right to silence, that is his right not to say what he does believe, would have to give way to the greater right of the public to minimize the number of subversive persons employed by the government. The interests to be balanced in the present case, at least as far as the First Amendment is concerned, are identical.

In *Adler v. Board of Education of the City of New York, supra*, the court upheld a statute which had the effect of barring persons from employment in the public schools who advocated or belonged to organizations which advocated the overthrow of the government by unlawful means. The court, on page 492, said:

> "* * * 'It is clear that such persons [employed or seeking employment in the public schools] have the right under our law to assemble, speak, think and believe as they will. * * * It is equally clear that they have no right to work for the State in the school system on their own terms. * * * If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not!' * * *
>
> "If, under the procedure set up in the New

> York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed [subversive] organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence."

The interests involved, at least as far as the First Amendment is concerned, are substantially the same in the present case.

In the recent case of *Speiser v. Randall*, 357 U. S. 513, the court struck down a California statute which conditioned the grant of a tax exemption on the filing of a loyalty affidavit. This case is significant for present purposes because the court distinguished cases in which some important governmental interest justified inquiry into loyalty despite its incidental effect on freedom of speech. Specifically, the court distinguished cases involving a particular group as opposed to the general public such as *Garner*, *Gerende*, and *Douds*, *supra*. This case would therefore not come under the rule of the *Speiser* case, *supra*.

In *Barenblatt v. United States*, 360 U. S. 109, the court again applied the relativistic concept of

the *Dennis* case, *supra*, and rejected Barenblatt's claim that he need not answer questions of the House Committee on Un-American Activities since it infringed on certain rights protected by the First Amendment. In balancing public and private interests, the court concluded that the field of education was not immune from all inquiry merely because of its importance to the free flow of ideas.

In *Uphaus v. Wyman*, 360 U. S. 72, the court more clearly defined the ambit of *Sweezy v. New Hampshire*, *supra*. In the *Uphaus* case, *supra*, the court affirmed the conviction of Mr. Uphaus on the ground that New Hampshire's interest in determining the presence of subversive persons outweighed Uphaus's interest in associational privacy.

Admittedly, an inquiry by a legislative body is not the same as an oath requirement; but in balancing the societal interest against the individual's interest the *Uphaus* and *Barenblatt* cases, *supra*, provide a guide in the present case.

— EVALUATION OF APPELLANTS' POSITION ON FIRST AMENDMENT

Before summarizing the effect of this entire line of cases, it is well to consider the portion of appellants' brief dealing with the First Amendment. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, cited by appellants (Br. 33, 38, 39) is not applicable. For there, unlike here, the government program did not represent a public interest with a substantial value. There is a basic distinc-

tion between having a man state what he does believe, in order to be employed in a sensitive public position and, as in *Barnette*, *supra*, forcing a man to state what he did *not* believe. The same distinction can be made with regard to the California and Wisconsin cases on which appellants rely so heavily. In *Danskin v. San Diego Unified School District*, 28 Cal. (2d) 536, 171 P. (2d) 885 (1946), any interest of the government in limiting the use of school facilities to "non-subversive" organizations was outweighed by the First Amendment guarantee of assembly. This case is consonant with *Thomas v. Collins*, 323 U. S. 516, and *DeJonge v. Oregon*, 299 U. S. 353, neither of which is applicable here.

In *Lawson v. Housing Authority of the City of Milwaukee*, 270 Wis. 269, 70 N. W. (2d) 605 (1955), the state court struck down a law requiring tenants in public housing to take a loyalty oath that they were not members of organizations on the Attorney General's list.

Without belaboring the point, it should be apparent that the interest of the government is ever so much more substantial in not having present members of subversive organizations in sensitive positions than in merely preventing subversive persons from occupying dwellings in a public housing project.

Appellants state (Br. 40) that:

> "The oath in this case not only proscribes advocacy of forcible overthrow, but also advocacy or teaching the alteration of the constitutional form of the government * * * by revolution. * * *"

Appellants argue that the affidavit requirement comes within the ambit of the *Thornhill* case, *supra*, in that it abridges the First Amendment by proscribing advocacy of a basic change in our form of government not accompanied by force, violence or the use of unlawful means. Appellants show that one of the dictionary definitions of the word "revolution" is:

> "A fundamental change in political organization, or in a government or constitution." (Br. 40.)

Appellants claim that since the words are used in the disjunctive, the Washington legislature was not seeking to prevent a revolution by force and violence, but rather a basic change such as the industrial revolution.

In short, as a federal judge once said in another connection, appellants have reversed the usual procedure by troubling the waters in order to fish in them! That is, appellants have given the word "revolution" the least legally sound interpretation possible in order to have it struck down. It should be pointed out first of all that, although the word "revolution" is in the disjunctive, the words "force and violence" are also in the disjunctive. Hence, appellants' argument proves too much; for, following their argument, if there were force there could be no violence. In any event this court has held in *Fox v. Washington*, *supra*, that the court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising difficult constitutional prob-

lems where any other interpretation is possible. In this case appellants did not ask for the court below to interpret this phrase and they should not be permitted to take advantage of this and raise the question for the first time before this court.

C. Recapitulation of Appellees' Argument on the First Amendment

Certain generalizations may be made about the long line of cases which appellees have cited. Admittedly, the government could not, for example, compel a person to disclose whether he believed in God since the government could reveal no substantial reason justifying such a coerced disclosure. Yet it is equally certain that there are times when the government has a substantial interest in having an individual disclose what he believes. For example, it can hardly be denied that the government has a substantial reason for requiring an applicant for citizenship to reveal whether he believes in our system of government on pain of denying him such citizenship. The interest of the government is at least as substantial in knowing whether employees and officials occupying sensitive positions are knowingly and presently members of a subversive organization. It is not hyperbole to say that it would shake the confidence of the public in its government if the government were somehow prevented by the First Amendment from ascertaining whether those who manned its sensitive positions belonged to such an organization.

With regard to "freedom of association," although a state may not penalize innocent association, as shown in the *Wieman* case, *supra*, it may certainly protect itself against untrustworthy public servants.

Finally, the concept of academic freedom should be briefly examined. As Professor Roger C. Cramton pointed out in 43 Minn. L. Rev. 1076:

> "* * * the notion that talk between academicians is of a higher order—and thus entitled to greater constitutional protection—than the conversations of the general citizenry is surely a foolish one. 'Academic freedom' has high value as a guild argument of teachers as a profession against their employers and as a symbol of the scholar's ideal—the search for truth. But it has never been thought that the employers of teachers (*i.e.*, the trustees of private institutions and the responsible heads of public institutions) were precluded by the Constitution from inquiring as to what goes on in the classroom or in passing on a teacher's qualifications on the basis of his conduct, writings, beliefs or any other matter thought relevant to fitness."

CONCLUSION

The decision of the court below should be affirmed in all respects.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

HERBERT H. FULLER,
Chief Assistant Attorney General,

Attorneys for Appellees.

APPENDIX

CHAPTER 254, LAWS OF WASHINGTON 1951

(This act is largely patterned after a Maryland Act, Ann. Code, 1951, Sec. 19; 1949, Ch. 86, Sec. 19, which was upheld by this court in the *Gerende* case, *supra.*)

Section 1. (RCW 9.81.010 (1) through (5).)

Definitions. For the purpose of this chapter:

"(a) 'Organization' means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"(b) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence.

"(c) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy

or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

"(d) 'Foreign government' means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"(e) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; [or who is a member of a subversive organization or foreign subversive organization]." (Brackets supplied.)

(Section 1, chapter 254, Laws of 1951 was, except for subsection (e) defining "subversive person," reenacted in its entirety by § 1, chapter 142, Laws of 1953. Subsection (e) was amended to read as follows:

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids

in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; *or who with knowledge that the organization is an organization as described in paragraphs two and three hereof, becomes or remains a member of a subversive organization or a foreign subversive organization.*" (Emphasis supplied.)

It is significant to note that the only change made in the definition of "subversive person" under the 1953 amendatory act was the substitution of the concluding clause italicized above for the concluding clause of the earlier definition, bracketed above. This change followed the decision of this court in *Wieman v. Updegraff*, *supra*.

Sec. 11 (RCW 9.81.060):

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state."

Sec. 12 (RCW 9.81.070):

"Every person and every board, commission, council, department, court or other agency of the state of Washington or any political sub-

division thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury."

(This section amended by § 1, chapter 377, Laws of 1955, *infra.*)

Sec. 13 (RCW 9.81.080):

"The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof."

(This section amended by § 2, chapter 377, Laws of 1955, *infra.*)

Sec. 14 (not codified):

"Every person who, on June 1, 1951, shall be in the employ of the state of Washington or of

any political subdivision thereof, other than those now holding elective office shall be required on or before July 1, 1951, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this act; namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this act. Such statements shall be prepared and execution required of and by every person and every board, commission, council, code department, court or other agency of the state of Washington or any subdivision thereof responsible for the supervision of other employees, for the employees under the jurisdiction thereof. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this act shall immediately be discharged."

Sec. 15 (RCW 9.81.090):

"Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this act, shall be cause for discharge

from any appointive office or other position of profit or trust in the government of or in the administration of the business of this state, or of any county, municipality or other political subdivision of this state, or any agency thereof. The attorney general and the personnel director, and the civil service commission of any county, city or other political subdivision of this state, shall, by appropriate rule or regulations, prescribe that persons charged with being subversive persons, as defined in this act, shall have the right of reasonable notice, date, time and place of hearing, opportunity to be heard by himself and witnesses on his behalf, to be represented by counsel, to be confronted by witnesses against him, the right to cross-examination, and such other rights which are in accordance with the procedures prescribed by law for the discharge of such person for other reasons. Every person and every board, commission, council, department, or other agency of the state of Washington or any political subdivision thereof having responsibility for the appointment, employment or supervision of public employees not covered by the classified service in this section referred to, shall establish rules or procedures similar to those required herein for classified services for a hearing for any person charged with being a subversive person, as defined in this act, after notice and opportunity to be heard. Every employing authority discharging any person pursuant to any provision of this act, shall promptly report to the special assistant attorney general in charge of subversive activities the fact of and the circumstances surround-

ing such discharge. Any person discharged under the provisions of this act shall have the right within thirty days thereafter to appeal to the superior court of the county wherein said person may reside or wherein he may have been employed for determination by said court as to whether or not the discharge appealed from was justified under the provisions of this act. The court shall regularly hear and determine such appeals and the decision of the superior court may be appealed to the supreme court of the state of Washington as in civil cases. Any person appealing to the superior court may be entitled to trial by jury if he or she so elects."

Sec. 17 (RCW 9.81.110):

"Every written statement made pursuant to this act by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who wilfully makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this act, or (c) under oath in any hearing conducted by any agency of the state, or of any of its political subdivisions pursuant to this act, or (d) in any written statement by an applicant for appointment or employment or by an employee in any state aid or private institution of learning in this state, intended to determine whether or not such applicant or employee is a subversive person as defined in this act, which statement

contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury, as prescribed in chapter 9.72, RCW."

CHAPTER 377, LAWS OF WASHINGTON 1955

(This act is amendatory of chapter 254, Laws of 1951. It amended two sections (12 and 13 quoted *supra*) and added two additional sections.)

Section 1 (amending § 12, *supra*):

"Every person and every board, commission, council, department, court or other agency of the state of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment."

Sec. 2 (amending § 13, *supra*):

"The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment and the requirement set forth in section 1 of this amendatory act, relative to membership in the communist party or other subversive organization, shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof."

Sec. 3 (additional):

"For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive order No. 9835."

(This section was held unconstitutional by the Supreme Court of Washington in the instant case and is not, therefore, before this court for review.)

Sec. 4 (additional):

"The communist party is a subversive organization within the purview of RCW 9.81 and membership in the communist party is a subversive activity thereunder."